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REVUE CRITIQUE

DE

Législation et de Jurisprudence.

ASSIMILATION OF THE STATUTORY LAWS OF THE PROVINCES OF ONTARIO, NEW BRUNSWICK AND NOVA SCOTIA.*

The plan finally adopted has been to gather together the statutes in each Province, bearing upon any particular subject, omitting, as a general rule, those subjects on which the Dominion Parliament, under the Union Act, has an exclusive right to legislate, such as the Criminal Law, the Militia Law, Navigation and Shipping, &c., subjects on which uniformity could be secured without the action of the Local Legislatures, but, nevertheless, selecting even from those subjects, one, Bills of Exchange and Promissory Notes, as coming within the daily operations of the merchants and traders of the three Provinces, for the purpose of illustrating the differences in some of the most ordinary branches of business.

The next step was to make a summary of the provisions in each Province bearing on the subject selected, placing the same in

* The British North America Act, 1867, provides for the assimilation of the laws of Ontario, Nova Scotia, and New Brunswick, and in accordance with this provision, steps have been taken by the Dominion Government to ascertain the differences in the statutory laws of these Provinces, the common law (the English common law) being the same in all the three. The Hon. J. H. Gray was entrusted with this difficult and honorable task, and he has already made his preliminary report to the Honorable Minister of Justice, supported by voluminous Appendices, which have not yet been printed. Our article is an extract from the said report, prepared and contributed by the honorable and learned Commissioner.—[Ed. Note.]

parallel columns, giving as nearly as possible the corresponding sections of the Acts of each Province, with the substance of each section, for facility of reference, and in a general column of remarks at the close, pointing out the difference. In some instances where the mode of legislature was so entirely dissimilar, as hardly to admit of a selection of corresponding sections, then to give a concise review of the main parts of the mode adopted in each Province.

In carrying out this plan it was found that while both in Nova Scotia and Ontario, the statutes had been revised up to a much later period, and that in both an available index to their statutes to within the last four or five years could be found, yet in New Brunswick there had been no revision since 1854, and no general index for sixteen or seventeen years.

First.—It became, therefore, necessary to prepare such an index. This was done.

Secondly.—As there were many of the Imperial Statutes, which affected the Dominion—were frequently referred to in the courts —governed the adminstration of justice, and bore upon the property and civil rights of the three Provinces, of which statutes no collection had been made or existed in any compact form in any of the Provinces; it was thought advisable to make one, briefly referring to them by their titles and subject matter, when they were not of a character frequently to be cited; when they were, by giving the sections in full, as well as the title and subject matter; but omitting all parts of the statute not bearing upon British North America. This was done.

Thirdly.—Applications were made to the Provincial Secretaries of the Provinces of Nova Scotia and New Brunswick, and to the Secretary of State for the Dominion, to obtain, if possible, a sufficient number of copies of the codified and uncodified laws of the two former Provinces, and of old Canada—to be used for cutting out the extracts for the paralled columns—leaving simply the general remarks to be written, thus saving labour and time, and greatly facilitating the readiness with which the comparisons could be made.

From Nova Scotia no copy of the Consolidated Statutes was obtained, but one set of the Acts for five years, from 1864 to 1869 was sent.

From the Secretary of State for Canada, one copy of the Consolidated Statutes, and the Acts passed subsequently up to the time of Confederation.

From New Brunswick, nothing but the Acts passed since Confederation; of the laws of the latter Province I had a perfect set of my own, which obviated the difficulty; and of those of Nova Scotia, I obtained the use of the Revised Statutes belonging to the Secretary of State for the Provinces.

Fourthly.—The Statutory Laws of Ontario, irrespective of any made by the Dominion Parliament, are found in the Consolidated Statutes of Canada, up to 1859; the Statutes passed by the United Parliament of Canada, from 1859 to 1867; the Consolidated Statutes applicable to Upper Canada alone, passed by the United Parliament up to 1859, and similar Statutes passed by the same Parliament from that period to 1867, and the Statutes passed by the Legislature of Ontario since 1867, making an approximate total, in round numbers of 1,600 Acts or chapters; but omitting those subjects that come exclusively within the scope of the Dominion Parliament, and have been legislated upon, and such Acts as were applicable to Quebec alone, about 1,100.

Fifthly.—The Statutory Laws of Nova Scotia will be found in one volume. The Revised Statutes, 3rd series, up to 1864, and in the Acts of the Local Legislature from that period, passed annually, comprising as above, about 700 Acts or chapters.

Sixthly.—In New Brunswick, the Statutory Law will be found in the 1st and 2nd volumns of the Revised Statutes up to 1854, and in the several Acts of the Local Legislature, annually passed since that period, comprising, excluding as above, and also those in the third volume, which are called private and local Acts, and which have not been at all referred to, about 1,200 Acts or chapters.

Seventhly.—Thus, in order to determine the Legislation on any particular point in Ontario, the search extends over a period of eleven years; in Nova Scotia of six years, and in New Brunswick of sixteen years, and for the purpose of determining the entire uniformity or differences between them on matters coming within the jurisdiction of their Local Legislatures, an examination of upwards of 3,000 Acts.

Eighthly.—The laws of Nova Scotia, as found in the Revised Statutes, are the simplest, best arranged and most easily understood. Those in Ontario, from the past position and history of that Province, as a part of old Canada, and the general and separate special local legislation that was necessary, and the changes that have been made by its Legislature since Confederation, are

necessarily the most complicated and difficult to arrive at, assuming that information of the law on any subject is sought by one who, from previous knowledge, is not familiar with the legislation affecting that Province. In New Brunswick, the absence of any revision for sixteen years renders the search more intricate than in Nova Scotia, though less than in Ontario.

Ninthly.—The re-enactment in the Provinces of New Brunswick and Nova Scotia of many of the old English Statutes affecting the ordinary relations of life, such, for instance, as the Statute of Frauds, 29 Charles 2, chap. 3, and adaptation of others, with special alterations, suited to the local wants and habits of the country, such, for instance, as with reference to distresses for rent, the recovery of rents by an action for use and occupation, &c., make a knowledge of the remedies within their power, attainable by the people, and by the local magistrates who administer justice in the rural districts.

In Ontario—while as in the other two Provinces—those parts of the 9th Geo. 4, chap. 14, rendering a "written memorandum "necessary to the validity of certain promises and undertakings," which relate to taking a case out of the Statute of Limitations, the ratification of an infant's promise after coming of age, representations as to the character and credit of a third party, being in writing, are specifically re-enacted; and a special reference is made to the Statutes of Frauds, for the purpose of extending the 17th Section, which relates to the sale of goods of the value of £10 and upwards; yet the provisions of the Statute of Frauds, with reference to promises for the debts or defaults of another, or in consideration of marriage, or on the sale of an interest in lands, or as to an agreement not to be performed within a year, &c., &c., do not appear to have been legislated upon, and the law in regard thereto must be sought for under the authority of chap. 9, of the Consolidated Statutes of Upper Canada, "An Act respecting property and civil rights," which declares, "that in all matters of "controversy relative to property and civil rights, resort shall be "had to the Laws of England, as they stood on the 15th October "1792, as the rule of decision." So also with reference to distresses for rent, or actions for use and occupation, &c., &c.

Tenthly.—In some cases the Legislation on particular subjects appears to be more limited in some Provinces than in others, probably from inadvertence, perhaps from the nature of trade. For instance, in Ontario, with reference to Bills of Exchange,

there is no provision whatever for the damages, interests, costs or protests on bills drawn on persons in Asia, Africa, Australia, New Zealand, Japan, Java, the Mauritius, Sandwich Islands, Cape of Good Hope; the East Indies with their great marts of trade, Bombay, Calcutta, Madras; or China, or Smyrna, or the other parts of the Eastern Mediterranean, or any places not coming under the designation of Europe, the West Indies, the United States, or other parts of America.

This omission, no doubt accidental, does not exist in the other two Provinces.

Eleventhly.—While New Brunswick and Nova Scotia long preceded Ontario in the adoption of that great legal reform which abolished the objection to witnesses on the ground of incapacity from crime or interest, and allowed parties to be witnesses in there own causes, leaving the question to be as to their credibility not their competency. (In New Brunswick as far back as 1856. In Ontario only in 1869). Yet, in several respects, the law in Ontario is in advance of New Brunswick, and in some degree of Nova Scotia, such, for instance as relates to imprisonment for debt, to recovery of landed property; to the discouragement of litigation by the difficulties thrown in the way of speculators in flaws in titles; by the powers that the courts and judges have of compelling a reference to arbitration in suits involving long and intricate accounts, the time occupied in the trial of which would operate as a denial of justice to other parties; by the clear and specific manner in which it disposes of the real estate of intestates, and others to which it is not necessary here to allude.

In many of these respects, the provisions of the law in Nova Scotia are equally excellent.

In New Brunswick, the law and its provisions relating to juries, both for its simplicity, its economy, and the finality resulting from the delivery of the verdict by a majority after due time for consideration,—the law relating to absconding debtors in dividing the estate fairly among the Creditors—instead of securing an absolute preference to the party who puts the process of the law in motion—and some of the provisions of the laws both in Nova Scotia and New Brunswick relating to partnerships, executors and trustees, to seamen, to wills, to the property of married women, &c., might judiciously be imported into the law of Ontario.

Twelfthly.—With reference to the Courts, while an Admiralty

jurisdiction and Court exist in each of the other Provinces, and under the extended powers given by a late act of the Imperial Parliament, 26 and 27 Vic., chap. 24, is influencing the administration of justice in a vast number of cases of constant occurrence in a trading and maritime community, which were almost without remedy before, and the benefit of which, under that Act, can be indefinitely extended to any of the Provinces,—Ontario with its vast lake trade is entirely without any such tribunal.

Thirteenthly.—In the Supreme Courts of the three Provinces, the jurisdiction is to the same extent; but in the Maritime Provinces, the Court of Chancery has been nominally amalgamated with the Courts of Common Law, and its existence as a distinct tribunal abolished. In New Brunswick its principles and mode of procedure remain as distinct as before the amalgamation with the Courts of Common Law, the change simply being that the Supreme Court has a Common Law side, and an Equity side. The same Judge may sit in Equity to-day and at Common Law to-morrow, and his decision at Common Law of to-day be restrained by his decision in Equity to-morrow.

He has no power, if in the progress of the cause at Common Law, it is found that the party would have a remedy or relief in Equity, to apply the remedy or give the relief, it must be sought for on the Equity side of the Court.

But though equitable defences in actions at Common Law are not provided for as in Ontario and Nova Scotia, yet, by Section 26 of the same Act, it is declared, "That whenever a demurrer "will lie to a Bill for want of equity, the Judge on the argument "may, if the facts warrant, instead of dismissing the Bill, order "the remedy as at Common Law, or he may make such other "order as to proceeding therein on the Common Law side of the "Supreme Court, and for the trial of the same on such terms as "to payments of costs or otherwise, as may appear to him just." "—Sub. chap. 2, 2nd vol. Revd. Stats. page 83.

In Nova Scotia the fusion was more complete. By chap. 123, Revd. Stats. of Nova Scotia, 3rd series, it is enacted that the Supreme Court shall have, within the Province, the same powers as are exercised by the Courts of Queen's Bench, Common Pleas, *Chancery* and Exchequer in England. By chap. 124, "Of proceedings in Equity," it was enacted—Revd. Stat. 431, Sect. 1—that in that chapter the term "Supreme Court" should "include the Equity Judge and his Courts; the term "the Court," "means

"the Court of the Equity Judge, except otherwise expressed or "clearly indicated; and jurisdiction expressed to be transferred "to and to be exercised by the Supreme Court means the jurisdic- "tion and powers of the Judge in Equity, alone, or with the asso- "ciated Judges, and of the Judges of the Supreme Court on "Circuit, and of the Supreme Court Bench on appeals."

"In the illness or absence of the Equity Judge, or in cases "requiring attention in the country, the duties imposed on him "shall be exercised by the other Judges, as the case may require. —Sect. 2.

"The Supreme Court has jurisdiction in all cases formerly "cognizable by the Court of Chancery, and exercises the like "powers and applies the same principles of equity as justice may "require, and as has formerly been administered in that Court. "In all cases in the Supreme Court in which matters of Law and "Equity arise, the Court before which they come for consider- "ation, trial, or hearing, shall have power to investigate and de- "termine both the matters of Law and Equity, or either, as may "be necessary for the complete adjudication and decision of the "whole matter according to right and justice, and to order such "proceedings as may be expedient and proper; and all writs is- "suable out of Chancery now issue out of the Supreme Court.— Sect. 3.

"The plaintiff may unite several causes of action in the same "writ, whether they be such as have heretofore been denominated "legal or equitable, or both. The causes of action so united "must accrue in the same right, and affect all the parties to the "action, and must not require different places of trial."—Sect. 7.

When applicable, the practice of the Supreme Court was to be observed, when not, the practice of the English Court of Chancery, and by Section 10, "In the final decision of cases on equity prin- "ciples, the Court shall give judgment according as the very right "of the cause and matter in Law shall appear to them, so as to "afford a complete remedy 'upon equitable principles applicable' "to the case. And in Sect. 43, it is declared lawful for the "plaintiff in replevin or a defendant in any cause in the Sup- "reme Court, in which, if judgment were obtained, he would be "entitled to relief against such judgment, on equitable grounds, "to plead the facts which would entitle him to such relief." And the plaintiff may reply an avoidance of those facts on equi- table grounds. And in ejectment, an equitable defence may be set up.

Immediately following this Act (by chapter 125), provision was, notwithstanding, made for a distinct Equity Judge, who was to make rules to govern the practice in equity before him, and to hear and determine all matters of equity jurisdiction, and to preside in the Court when business required, and in the absence of the Judges of the Supreme Court from Halifax, to perform all the duties there that might be required of a Judge of the Supreme Court.

There was to be an appeal from his decisions to the Supreme Court, in which he was to sit as one of the Judges of Appeal. He was also to sit in Supreme Court in Banc., and at Chambers, but not to preside at trials or on circuit, except in case of illness of a Judge, or other sufficient cause.

In full Bench, in cases civil or criminal, legal or equitable, the Chief Justice was to preside; the Judge in Equity next to him. and, in case of the Chief Justice's absence, to preside.

Two years afterwards, in 1866, by 29 Vic., chap. 11, amending chapters 124 and 125, the above four sections, 1, 2, 3, 7, of chapter 124 were repealed, and the Equity Court and jurisdiction again re-established. Sec. 7 enacts, "That the 'Supreme Court,' "and 'the Court,' and the 'Judges' or 'Judge,' in such chapter, "except when herein otherwise expressed, or when inconsistent "with the enactments hereof, are confined, in all cases of exclus- "ive chancery jurisdiction, to the Court of the Equity Judge, "or the Court or Judge occasionally exercising the equity juris- "diction; and in all cases of concurrent jurisdiction, those terms "apply alike to such Court and Judge, and to the Supreme Court "and its Judges; and in all cases purely at Common Law, con- "tradistinguished from Chancery jurisdiction, those terms mean "the Supreme Court and its Judges alone: and all suits or other "proceedings for the redemption or the foreclosure of mortgages "under the 24th section, and for specific preformance under the "25th section; and in relation to real estates of infants, under "the sections from the 51st to the 55th, both inclusive, of said "chap. (124); and all proceedings, matters and things relating "to the custody, care, and disposal of persons of unsound mind, "and there estate and effects, under the sections from 2 to 9, both "inclusive, of chap. 152 of the Revd. Statutes; and also, all "proceedings under chap. 131 of the Revd. Statutes, third series, "of 'trusts and trustees,' are under the equity jurisdiction only, "and shall be prosecuted and conducted accordingly; and the

"terms, 'the Supreme Court,' and 'the Court,' and the 'Judges' "used in the said sections and chapter, mean the Equity Judge, "or the Equity Court, or the Court or Judge occasionally exer- "cising the equity jurisdiction.

"But nothing in either of the said chapters 124 or 125, applies "to or affects chapter 114 of the Revised Statutes, third series, "'Of the sale of lands under foreclosure of mortgages,' the pro- "ceedings under which may continue to be in the Supreme Court "and before the Judges thereof.

"In case of the illness of the Equity Judge, or in case of his "absence from Halifax, either within the Province on judicial "duty, or for other cause, or abroad, and also in cases requiring "attention in the country or circuit, and when the Equity Judge "does not preside, the duties imposed on him may be exercised "by the other Judges, or any of them as the cases may require." —Sect. 8.

"The Equity Judge has jurisdiction in all cases formerly cog- "nizable by the Court of Chancery, and exercises the like powers, "and applies the same principles of equity as justice may require, "which were formerly administered in that Court."—Sect. 9.

Section 6 of chapter 124, which provided, that in the absence of the Judges of the Supreme Court from Halifax, the Equity Judge should perform all the duties of a Judge of the Superme Court, was repealed; and in place of it, was enacted in section 3 of said chapter 11, 29 Vic., that the Court of the Equity Judge should "be always open, and the other Judges of the "Supreme Court or any of them, in cases where empowered, to "exercise the functions of the Equity Judge, should have the full "powers of the Court."

The right of the Supreme Court to admit of equitable defences, was still retained, section 10 says:—

Section 10. "But nevertheless in all actions at law in the Su- "preme Court, on the trial or argument of which matters of equi- "table jurisdiction arise, that Court has power to investigate and "determine both the matters of law and of equity, or either, as "as may be necessary for the complete adjudication and decision of "the whole matter; and also, all actions at law, to which equitable "defences shall be set up in virtue of the sections of this chapter, "under the head 'Equitable Defences,' from sect. 43 to sect. 50, "both inclusive, are, and shall continue to be tried, considered, "and adjudicated by the Supreme Court and its Judges in the

"same manner as regards the said several cases respectively, as "the Supreme Court or the Judges thereof had power to do when "the Act for appointing a Judge in Equity was passed."

"But it shall be lawful for the Supreme Court, or any Judge "of that Court, before whom the consideration, trial, or hearing "of any question of equitable jurisdiction, or any such mixed "questions of law or equity may come, if they or he shall deem "it expedient and conducive to the ends of justice to do so, to "order the case, or any subject matter arising thereon, to be trans- "ferred to the jurisdiction of the equity Judge, to be dealt with "according to the principles of equitable jurisprudence, and the "exigencies of the case."

By an Act passed, chap. 2, 1870, "To improve the Administration of Justice," it is enacted that the Supreme Court should hereafter be composed of a Chief Justice, a Judge in Equity, and five other puisne Judges, and that the Judge in Equity should not be required to attend the Circuits, or sit in Banc. to hear arguments, except on appeals from the Equity Court, when he shall sit with the others; and further, that in case of his continued absence from the Supreme Court sitting in Banc., from illness or other cause, appeals from his decisions may be heard, and judgment pronounced as if he were present.

In Ontario the court and judges of common law and chancery, with their principles and practice remain as separate and distinct as they ever were, save that, as in Nova Scotia, there is a provision that a defendant or plaintiff in replevin, in any case may plead or reply the facts, that on equitable grounds would afford relief in equity against the judgment at law if obtained, subject to the opinion and action of the judge, whether the same can or cannot be dealt with by a court of law so as to do justice between the parties.

Thus, in the absence of any knowledge as to what construction may have been put or may yet be put upon the first part of Section 10, 29 Vic., chap. 11, Nova Scotia Act of 1866, it would seem that Nova Scotia in this respect has come back to where Upper Canada had remained, except as to the sale of lands under the foreclosure of mortgages, chap. 114, Revised Statutes 403, and it is thought, that in New Brunswick some material modification of the present system will at an early day have to be adopted, either by a more complete separation or by a more complete fusion of the courts of common law and equity.

The latter, if judiciously accomplished, would probaly be the most desirable, as those who are compelled to seek redress in litigation, expect to obtain, and ought to obtain justice full and complete, when it is admitted they are entitled to it, without being sent at great expense from law to equity, and from equity to law, to find it.

Fourteenthly.—In the Courts of limited jurisdiction the distinction is more nominal than real. Those in Ontario are the Country Courts and the Division Courts, the former having jurisdiction, subject to certain exceptions, over personal actions not exceeding $200 unliquidated damages, and $400 when the damages are liquidated, and by 23 Vic., chap. 43, in actions of ejectment where the annual value of the premises does not exceed $200. The latter being sub-divisions of the country with certain exceptions to personal actions of $40, and money demands of $100.

In New Brunswick they are the Country Courts and the Magistrates' Courts; the former having jurisdiction, subject to certain exceptions similar to those in Ontario, in actions *ex contractu* to $200, in *torts* to $100, but no right to try ejectment; the latter, or Magistrates' Courts, in actions *ex contractu* to $20, *torts* to $8. The City Court of St. John has an exceptional jurisdiction of its own

In Nova Scotia there are no Country Courts, but the Magistrates' Courts have jurisdiction for the recovery of debts—one Justice when the dealings do not exceed $20, two Justices when the whole does not exceed $80. The jurisdiction being confined to the country where the debt was contracted, or the defendant resides.

In both Nova Scotia and New Brunswick there is a "Court of Divorce and Matrimonial Causes," with full powers to dissolve marriages *a vinculo matrimonii*, to declare the same null and void, and to hear and determine all causes, suits, controversies, matters and questions touching and concerning marriages.

In both Provinces the Court is a branch of the Supreme Court and presided over by one of its Judges, specially appointed for that purpose in New Brunswick by commission under the Great Seal of the Province, and in Nova Scotia, *ex officio* by the Judge in Equity for the time being, who is for that purpose termed "the Judge Ordinary." A difficulty has arisen in New Brunswick from the Act constituting this Court, making no provision

for the substitution or appointment of another Judge to act *pro hac vice* in case of the illness or absence of the Judge so appointed by commission, or his being prevented by other causes from presiding.

In Nova Scotia, the Act passed in 1866 with referenee to this Court, provided that during the illness or temporary absence of the Judge Ordinary, the Governor in Council might appoint the Chief Justice or one of the Judges of the Supreme Court to act as Judge Ordinary, and by an Act passed in 1870, this last power was further extended to meet the case of his being prevented from presiding by any disqualifying cause. If this latter Act does not come within section 91 of the British North America Act, 1867, the difficulty in New Brunswick can be removed by local legislation. This difference, therefore, at present exists between those two Provinces on that subject. In both Provinces, powers are given to the Court to enforce its decreees, and in case of divorce on the ground of adultery, to determine whether the wife's right of dower, or the husband's tenancy by the courtesy shall be divested or not.

In New Brunswick the grounds of divorce, *a vinculo*, are limited to impotence, adultery, and consanguinity within the degrees prohibited by the 32 Henry VIII., touching marriages and pre-contracts.

In Nova Scotia they are extended to include cruelty and pre-contract.

In New Brunswick there is an express provision that the divorce *a vinculo* on the ground of adultery, shall not in any way affect the legitimacy of the issue. In Nova Scotia there is no such provision, perhaps not deemed necessary. In both Provinces provisions are made for appeal from the decision of the Judge to the Supreme Court, and in New Brunswick from the Supreme Court to the Privy Council in England.

In Ontario there is no statute constituting a Court of marriage and divorce.

In New Brunswick and Nova Scotia the Supreme Court being the sole Superior Court, there is no Court of appeal from its decisions, except to the Judicial Committee of the Privy Council in England, which, owing to the great expense attending any appellate proceedings therein, is practically of no avail to the great mass of the people in those two Provinces.

In Ontario a Court of Appeal is constituted, composed of the

Judges for the time being of its Superior Courts, of Queen's Bench, Chancery, and Common Pleas, with power to the Governor General to appoint any retired Judge of one of the said Courts to be the Chief Justice, or an additional Judge of the said Court of Error and Appeal.

Thus Ontario is the only one of the three Provinces which affords to the litigants therein, without resort to a distant and most expensive tribunal, the opportunity of an appeal to a Court composed of Judges other than those of the particular Court in which the complainant may justly conceive that he has been condemned or deprived of his rights contrary to law.

In Ontario the Senior Judge of the County Court is, *ex officio* Judge of the Surrogate Court.

In New Brunswick and Nova Scotia the Surrogate Judge of Probate is appointed directly to that office by the Governor in Council.

In Ontario, the Surrogate Court may order any question of fact, arising in any proceeding before it, to be tried by a Jury before the Judge of the Court, when such trial would take place in the County Court in the ordinary manner.

In New Brunswick and Nova Scotia, the Probate Courts have no such power.

Fifteenthly.—With reference to executors and administrators, an important provision exists both in Ontario and Nova Scotia relative to the law of evidence in suits arising out of matters with deceased parties in which issue has been joined, and a trial or any enquiry, is being had, namely, that it shall not be competent for the survivor or survivors, being a party or parties to the suit, or their wives, to give evidence on their own behalf, of any dealings, transactions, or agreements with the deceased, or of any statements or acknowledgments made, or words spoken by deceased, or any conversation with deceased; but such parties may be compelled to give evidence on behalf of deceased.

This apparently fair policy has not been adopted in New Brunswick, and is not in accordance with the law in England, perhaps because it is depriving one party, without any fault of his own, of an advantage which both possessed; and perhaps because the knowledge that such an advantage may be lost, induces parties more to reduce their agreements to writing, and thereby avoid unseemly conflicts of testimony.

In Nova Scotia, the proceedings against executors and admi-

nistrators *cum testamento annexo* have been simplified on behalf of legatees by permitting actions at Common Law, and in the same Act, for enabling executors appointed trustees by a will, or trustees appointed by deed, to be relieved of their trust or executorship by an application to the Supreme Court, or to be removed on an application in the same way by any one interested in the execution of the trust.

In the course of the work, Mr. Butler's Alphabetical Index of the Canadian Statutes, from 1859 to 1867, has been continued. So far as Ontario is concerned, from 1867 to the present day, and the New Brunswick index, first prepared and referred to above, has also been further continued to the present time.

There are many other differences which will be observed by an examination of the schedules annexed, but it is obvious that any review of a subject so comprehensive as the legislation of three Provinces must be more or less imperfect, unless made by persons familiar with the construction put upon the Statutes of each Province by the Courts of each Province. A knowledge of the decisions of the Courts in one Province alone might very erroneously lead a party to suppose that inadvertencies or omissions existed in the Statutory Laws of the other Provinces, which an aquaintance with the decisions of the Courts of those Provinces might show was not the case, but a knowledge of which could only be obtained by their being brought forward or quoted in the discussion on those differences themselves.

Opinions of the Statutes as found in the Statute Book, without knowing how far the practical operation of those Statutes may have been extended or narrowed by the critical examination to which they would be subjected in the process of judicial enquiry, must be subject to inaccuracies.

The instructions given to me being simply to prepare for a Commission hereafter to be issued—not to recommend or propose any form—I have confined my labor solely to pointing out the differences; but there can be no doubt that an excellent practical Code of Law, simple in its language, easily understood, expeditious and economical in its administration, could be formed from a judicious selection of the best of the Laws of each of the Provinces by men who were severally acquainted with each.

J. H. GRAY.

LE DROIT CONSTITUTIONNEL DU CANADA.*

(Suite et fin.)

II.—QUELLES SONT LES AUTORITÉS COMPÉTENTES POUR DÉCIDER LES QUESTIONS CONSTITUTIONNELLES.

Nous avons déjà eu occasion d'indiquer cette autorité, en discutant la valeur des traités internationaux; il n'est peut être hors d'à propos d'insister plus longuement sur ce sujet important.

Il est évident qu'aucune législature ne peut être juge des questions constitutionnelles. Le jour, où la Législature d'Ottawa se permettra de décider de la validité d'une loi d'une legislature locale, verra disparaître la liberté et l'indépendance des provinces confédérées.

On prétend que la décision des questions constitutionnelles appartient exclusivement à l'Exécutif des divers gouvernements supérieurs; on cite à l'appui de cette prétention les clauses 56 et 90 de l'Acte de l'Amérique Britannique du Nord, 1867. La clause 56 déclare que la *Reine en Conseil* pourra désavouer toute législation de la Puissance dans les deux années de sa transmission au Secrétaire d'Etat, à Londres; et "ce désaveu étant signifié par le Gouverneur Général, par discours ou messages à chacune des Chambres du Parlement, ou par proclamation, *annullera l'acte à compter du jour de telle signification.*" La clause 90 contient une disposition analogue à propos des lois des législatures locales, avec cette différence que le désaveu doit-être fait durant l'année par le Gouverneur Général, au lieu de la Reine en Conseil, et qu'il doit-être publié par le Lieutenant Gouverneur de la Province.

Il n'entre pas dans le cadre d'une revue légale de discuter la valeur politique de cette vaste prérogative du droit de veto, qui s'est déjà fait cruellement sentir sur les chambres du Parlement

* Dans la première partie de notre travail, p. 202 nous affirmons "qu'aux Etats Unis, les traités n'obtiennent force de loi que par la sanction du Congrès." Nous avons omis de dire qu'il ne s'agissait que des traités qui disposent des fonds publics ou du territoire de la République. On sait en effet que la plupart des traités Américains sont ratifiés par le Président avec le consentement du Sénat.

du Canada dans le rejet de la loi fédérale réduisant le salaire du Gouverneur Général de $50000 à $35000. Ce qu'il nous faut rechercher, c'est son effet purement légal. On ne saurait soutenir qu'elle constitue l'autorité compétente pour décider de la constitutionalité des lois. Il est évident que le droit de veto est non pas un droit judiciaire, mais un droit administratif, d'après lequel les lois pourront être désavouées, non pas seulement pour cause d'invalidité, mais pour des considérations d'ordre public ou politique; et de fait le désaveu du bill du salaire du Gouverneur Général nous offre un exemple pratique fort remarquable de la vérité de cette proposition.

L'on a sans doute observer qu'il ne suffit pas que le veto ait été apposé; il faut encore qu'il ait été signifié. Supposons que le Lieutenant-Geuverneur de la Province en refuse la signification à la Législature Locale, ou encore qu'une loi inconstitutionnelle ne soit pas désavouée; soutiendra-t-on que, si la loi ainsi désavouée ou non, est nulle constitionnellement, les tribunaux devront l'appliquer tant que le veto ne sera pas parfait? Une telle prétention est trop absurde pour être soutenue. Il est évident que le pouvoir de juger les questions constitutionnelles doit nécessairement résider ailleurs que dans le conseil exécutif ou législatif. Les tribunaux, ces gardiens des lois de l'Empire et de celles de la Puissance et des Provinces, voilà l'autorité chargée exclusivement du soin de maintenir la Constitution. Mais quels tribunaux? Ceux de la Puissance ou ceux des Provinces?

La Puissance n'a pas encore de tribunaux propres. La création d'une Cour Suprême depuis si longtemps promise est encore attendue. Néanmoins ses attributions sont déterminées d'une manière tellement précise dans l'acte constitutionnel, qu'il est permis d'en parler. La section 101 de l'Acte de l'Amérique du Nord, 1867, déclare: "Le Parlement du Canada pourra adopter des mesures à l'effet de créer, maintenir et organiser *une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada.*" La Cour Suprême de la Puissance sera donc essentiellement une cour de juridiction d'appel pour toute l'étendue du Canada; et la juridiction de première instance, qui est donnée *aux tribunaux additionnels*, pour l'application des lois de la Puissance seulement, lui est par là même interdite. On ne peut rien trouver dans cette constitution de la Cour Suprême ou de ces tribunaux additionnels, apparemment semblables à la Cour

Suprême et aux Cours de Circuits des Etats Unis, qui limite l'examen des questions constitutionnelles à ces cours de justice.

Puisque la Cour Suprême sera uniquement une cour d'appel pour toute la Puissance, il faut nécessairement conclure qu'elle ne pourra avoir plus de pouvoirs que la cour dont il sera appel. Ainsi donc tous les tribunaux du pays sont chargés du soin de décider les conflits constitutionnels.

On objecte que les tribunaux sont les créatures du Gouvernement ou du Parlement ou des deux pouvoirs à la fois, et que ce serait renverser l'ordre public et politique que de les investir du droit de prononcer sur la validité des actes du corps législatif. Nous avons touché cette objection à propos des traités; mais il est important de nous y arrêter plus longuement. Les cours de justice ne sont certainement pas les serviteurs des autorités gouvernementales qui siègent soit à Ottawa, soit à Québec. La source première de leur juridiction se trouve non pas dans les actes du Parlement Colonial, mais dans les Statuts et les lois de l'Empire et, on pourrait ajouter, primativement dans la personne du Souverain. Il n'est donc que trop juste que les tribunaux, au nom de l'Empire, au nom du Souverain, déclarent invalides des ordonnances passées contre leur volonté.

D'ailleurs c'est un principe du droit constitutionnel Anglais que l'interprétation comme l'application des lois appartient au pouvoir judiciaire. Suivant la fière expression de Chitty * "the House of Lords in the interpretation of the laws is omnipotent; that is free from the control of any superior authority provided by the constitution." Toutes les juridictions judiciaires de l'Empire ont d'ailleurs cette suprématie, puisque la Chambre des Lords comme notre Cour du Banc de la Reine, ou le Conseil Privé, n'est q'une cour d'appel.

Et en vertu de quel droit la Législature peut-elle invoquer qu'elle n'est pas responsable de ses actes au pouvoir judiciaire. N'est-il pas vrai que lorsqu'elle viole la Constitution, elle ne constitue plus un pouvoir législatif, mais purement et simplement un pouvoir usurpateur? La section 129 ne déclare-t-elle pas qu'elle ne peut changer les lois existantes qu'en se conformant à la Constitution, que "conformement à l'autorité du Parlement ou de cette législature en vertu du présent acte?" La loi n'est donc pas changée lorsque le législateur excède ses pouvoirs, et évidem-

* Chitty on Blackstone, vol. 1, p. 117.

ment, le juge qui maintient la loi et ignore l'acte de l'usurpateur remplit un devoir sacré. Et s'il arrivait que la magistrature abuserait de son autorité supérieure, ne peut-on pas encore ajouter que le remède est entre les mains de la Législature en forçant le juge de justifier devant elle de sa bonne conduite?

D'ailleurs ce droit d'appréciation des actes des législatures coloniales ou inférieures n'est pas nouveau dans le droit public Anglais. Il a été maintes fois exercé par les tribunaux de l'Empire et des Colonies; et il suffit de référer aux autorités suivantes pour s'assurer qu'il y est incontestable. *

La question a été récemment soulevée et discutée avec autant de talent que de science devant la Cour Suprême de Terreneuve, dans la célèbre cause de *Carter* v. *Le Mesurier*, décidée le 20 Mai 1870, et rapportée au 6me. volume du *Canada Law Journal*.

Les requérants pour bref de prohibition contre tous les membres d'un comité d'élection se plaignaient d'irrégularité et illégalité de leur part. Le Procureur-Général comparut pour eux et protesta contre l'intervention judiciaire dans ce qu'il considérait les procédés de l'Assemblée Législative.

"The Committee," disait-il, "being a part of the Assembly "itself, and being appointed by that body for the purpose of con- "ducting and determining an inquiry into the claims of certain "parties to seats in the House, to prohibit it from proceeding in "accordance with the orders of the House would be an illegal "interference with the exclusive powers and privileges of the "Assembly, for which no authority or precedent could be found."

Le Banc à l'unanimité lui répondit:—"Both Houses of the "Assembly possess, as incident to their existence, all rights ne- "cessary for the due discharge of their legitimate functions, but "the judgment of the Judicial Committee of the Privy Council, "in a case which arose in Newfoundland thirty-two years ago, "*Kielley* v. *Carson*, and has been affirmed by several other deci- "sions in the same High Court of Appeal, has denied and for "ever set at rest the pretensions which once were raised by "Colonial Legislatures, that, under the assumption that the "Law of Parliament" applied to them, their will was law, and

* *Kielly* v. *Carson*, 4 Moore, P. C. 63; *Fenton* v. *Hampton*, 11 id. 347; *Doyle* v. *Falconer*, L. R. 1 P. C. 328; Re Brown, 33 L. J. (N.S.) Q. B. 193; *Cavillier* v. *Aylwin*, 2 Knapp, 72; *Bank of Australia* v. *Nias*, 16 Q. B. 733; *Craw* v. *Ramsay*, Vaugh, 292.

" their proceedings were unexaminable by the Superior Courts. " It is altogether visionary to imagine that any Legislative As- " sembly, body or person, possesses under British rule supremacy " over the law in any particular whatsoever. Even the prototype " of Colonial Legislatures does not claim for itself any such " power, for in a recent work of no ordinary ability upon Parlia- " mentary Government in England, I find the following passage: " ' No mere resolution of either House, or joint resolution of both " Houses, will suffice to dispense with the requirements of an " Act of Parliament, even although it may relate to something " which directly concerns but one Chamber of the Legislature: ' " Todd's Parliamentary Government, 260."

Enfin si la question était même tout-à-fait nouvelle parmi nous, il faudrait, la résoudre dans le même sens, sur la seule autorité de la jurisprudence des Etats Unis, établie sous un régime constitutionnel presqu'identique.

À une époque aussi reculée que 1803, à l'enfance même de la République, la Cour Suprême des Etats Unis proclamait ce principe comme d'ordre public et de l'essence même des institutions fédérales. " If an act of the legislature," disait-elle * repugnant to the constitution, is void, does it, notwithstauding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

" It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and constitution apply to a particular case, so that the court must either decide the case conformably to the Law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

" If then the courts are to regard the constitution; and the

* *Marbury* v. *Madison*, 1 Cranch 177.

constitution is superior to any ordinary act of the Legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

" Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

" This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void; is yet, in practice, completly obligatory. It would declare, that if the Legislature shall do what is expressely forbidden, such act. notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breadth which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."

En 1829 le principe fut encore affirmé par le même tribunal dans la cause de *Bank of Hamilton* v. *Dudley's Lessee.* * Per Marshall C. J. :—" The judicial department of every government is the rightful expositor of its laws; and emphatically of its supreme law. If in a case depending before any court, a legislative act shall conflict with the Constitution, it is admitted that the court must exercise its judgment on both, and that the Constitution must control the act. The court must determine whether a repugnancy does or does not exist, and in making this determination, must construe both instruments. That its construction of the one is authority, while its construction of the other, is to be disregarded, is a proposition for which this Court can perceive no reason."

Le language que tiennent les tribunaux des Etats est aussi précis. " The right" disait en 1815 le juge Martin pour la Cour Suprême de l'Etat de la Louisiane † " which courts of justice have to refuse their co-operation to the execution of unconstitutional laws is no longer a question. It results from the obligation contracted by the judges to support the Constitution, the fundamental and Supreme Law of the State, which no authority can shake."

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* 2 Peters 524.

† *Johnson* v. *Duncan*, 1 Martin N.S. 654.

En 1826, le juge Porter pour la même cour disait. * "The counsel for the plaintiff on the argument of the cause, went at some length into the question, whether this court had the power to pronounce an act of the legislature unconstitutional. Were the question doubtful, the authorities he read might well be considered as settling it; but any reference to them, to support the position assumed was unnecessary in this court. It is a subject on which we never had a doubt, nor have any at this moment."

III.—DANS QUELS CAS UNE LOI PEUT-ELLE ETRE DÉCLARÉE INCONSTITUTIONNELLE ?

Aux termes de l'Acte de l'Amérique Britannique du Nord, 1867, il importe peu que le pouvoir de législater accordé à chacune des législatures ait été exercé ou non. Bien différente sous ce rapport des législatures des Etats de l'Union Américaine, leur juridiction respective est exclusive, et leur silence sur une matière de leur compétence ne justifie pas une législation émanant d'une autre source que celle indiquée par l'Acte Fédéral. Aux Etats-Unis, c'est un principe depuis longtemps établi que les Etats peuvent passer des lois de faillite en l'absence de telles lois de la part du Congrès; parce que la constitution américaine n'est pas exclusive sous ce rapport. Au Canada, au contraire, quand bien même l'Acte concernant la faillite 1869 serait abrogée, les législatures locales ne pourraient y suppléer en aucune manière pour leurs provinces respectives. C'est ce qui résulte évidemment des termes de la constitution. *L'autorité exclusive du Parlement du Canada ou des législatures locales s'étend etc.* † "As the plan" dit un jurisconsulte d'une haute autorité en parlant du système fédéral des Etats-Unis ‡ aimes only at a partial union or consolidation. the state governments would clearly retain all the rights of sovereignty, which they before had, and which were not, by that act, *exclusively* delegated to the United-States. This exclusive delegation, or rather this alienation of state sovereignty, whould only exist in three cases: where the constitution in express terms granted an express authority to the Union. The last clause but one in the eight section of the first article, provi-

* *Le Breton* v. *Morgan*, 4 Martin N.S. 138.

† Voir sections 91 et 92 de l'Acte de l'Amérique du Nord, 1867, citées plus haut.

‡ Story, Com. on the Constitution of U. S. § 199.

des expressly, that congress shall exercise exclusive legislation over the district to be appropriated as the seat of government. This answers to the first case. Story ajoute: "The correctness of these rules of interpretation has never been controverted, and they have been often recognized by the Supreme Court."

Une règle d'une haute importance dans la décision des questions constitutionnelles veut que les tribunaux ne prononcent l'invalidité des lois que lorsqu'elle est claire et incontestable; et à cet égard la jurisprudence de nos voisins est encore notre guide.

Brooks vs. *Weyman*, * by the Court: "We reserve to ourselves the authority to declare null any legislative act which shall be repugnant to the constitution; but it must be manifestly so, not susceptible of doubt."

Johnson vs. *Duncan*, † Derbigny J. "This Court has already had occasion to express their opinion in the case of the *Syndics of Edward Brooks* vs. *Weyman;* but they have also there expressed their sense of the circumspection with which such a right onght to be exercised. It is only in cases where the incompatibility of the law with the constitution is evident that courts will go to the length of declaring null an act which emanates from legislative authority."

Nicholson vs. *Thompson* ‡ Martin J. "The Judges of this Court have always considered themselves as the guardians of the constitutional rights of the people, and as such autorized to pronounce on the constitutionality of the acts of the two other departments of government; but we cannot say, that any act of theirs is unconstitutional unless it be manifestly so, and the question is not susceptible of doubt. *Syndics of Brooks* v. *Weyman*, 3 Mart. 12. In the case of *Johnson* v. *Duncan et al., Syndics*, Id. 553, we held that it is only in case where the incompatibility of the Law with the constitution is evident, that courts will go the length of declaring null an act which emanates from legislative authority. In *Fletcher* v. *Peck*, 6 Cranch, 87, Chief Justice Marshall, says; "the question whether a law be void for its repugnancy to the "constitution, is at all times, a question of much delicacy, which "ought seldom if ever to be decided in the affirmative in a "doubtful case.

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* 1 Martin, N. S., 381 (1813.) † 2 Martin N. S. 654 (1815).
‡ 5 Robinson, 404 (1843).

" It is not on slight implication, and vague conjecture, that the " Legislature is to be pronounced to have transcended its powers, " and its acts to be considered as void. The opposltion between " the constitution and the law, should be such, that the judge " feels a clear and strong conviction of their incompatibility with " each other"

Hgde v. *The Planters Bank of Mississipi*, 8 Rob. 422, Per Bullard, J ; " No adjudged case has been referred to in support of this position, and a very strong case must be made out to enduce us to declare the Law of a neighbouring State unconstitutional, especially when it appears that the purpose of the law was in a great measure remedial. . . . . But this court will not in any case of serious doubt as to the constitutionality of laws, pronounce them void especially when their operation is to protect our own citizens from injuries arising from the abuse of the banking power."

The State v. *The Judge of the 5th Judicial District*, Per Eustis, C. J : " To determine on the constitutionality of laws, the question whether the legislative branch of the Government has or not transcended its power, is the highest and most important act which the judiciary can be called upon to perform, and in the exercise of this responsible and delicate power, courts are bound to proceed with the greatest circumspection and deliberation. It has always been held that the presumption must always be in favour of the validity of laws, and that no law ought to be held unconstitutional, and consequently void and of no effect unless its opposition to the constitution be clear and free from doubt. It must be conceded that there is no article of the constitution with which this Statute is clearly or directly in conflict, and its repugnancy to the constitution is supported exclusively by implication. Without answering each argument of the respondent in detail, we think they will all be met by giving our views as to the judicial power as created by the constitution.

" The judicial power shall be vested in a Supreme Court, in District Courts, and in Justice of the Peace, Art. 63. This certainly means that the whole judicial power, (the power of determining all cases without exception or reserve,) is vested in these three classes of magistracy, and in establishing this power to provide for the determination of every case of injury, the convention which framed the constitution acted on the elementary principle in the English Law, in reference to which our constitution in the

United States have all been made, that every right when withheld must have a remedy, and every wrong its proper redress." (*)

IV.—DE LA CONSTITUTIONALITÉ DE LA LOI CONCERNANT L'UNION ST. JACQUES DE MONTRÉAL ET DE QUELQUES DISPOSITIONS DE L'ACTE CONCERNANT LA FAILLITE, 1869.

Ce n'est pas notre intention de discuter la valeur des motifs de la décision de l'honorable juge Torrance dans la cause de *Bélisle* vs. *l'Union St. Jacques*, vu qu'elle a été portée en appel; qu'il nous soit néanmoins permis d'observer que la principale question que présente cette espèce est de savoir si les mots, *banqueroute et faillite* de la constitution, *bankruptcy and insolvency*, comprennent également la déconfiture des particuliers non commerçants, dont les rapports appartiennent tout particulièrement au droit civil. Lorsque l'on considère que les matières sur lesquelles le Parlement de la Puissance a juridiction, sont toutes de droit public ou commercial, ne peut-on mettre en doute que ces mots *banqueroute et faillite* ne s'appliquent qu'aux commerçants? Et si le doute est permis, ne doit-on pas maintenir la loi attaquée d'invalidité?

Il existe encore plusieurs lois dont la validité peut raisonnablement être mise en question. Que penser en effet des clauses 10e et 12e de l'Acte concernant la faillite 1869, qui, en violation des lois formelles des Provinces, veulent que l'enrégistrement d'un acte de cession, sans description des immeubles soit effectif; des clauses 67, 77, 78 et 81 qui limitent si considérablement les privilèges du propriétaire et des employés ou commis; de la clause 114 qui permet l'examen de la femme du mari devant le juge; et enfin de la clause 140 qui exige, à peine de nullité, l'enregistrement des contrats de mariage des femmes des commerçants? Toutes ces clauses ne consacrent-elles autant de dispositions contraires aux lois civiles de chaque province? On ne saurait prétendre qu'elles forment essentiellement partie des lois de banqueroute, car il est facile de les détacher de l'acte de faillite, sans l'atteindre d'une manière importante. Et enfin, s'il était permis au Parlement Fédéral d'introduire toute espèce de législation, sous prétexte qu'elle est inhérente aux lois de banqueroute, tout

(*) 15 An. Louis, 758—voir aussi les autorités citées dans Fletcher v. Peck, (1810), 6 Cranch 87.

notre Code Civil serait à la merci de nos législateurs d'Ottawa. On a aboli en partie les privilèges qu'il accorde aux locateurs et aux serviteurs; quelle garantie avons nous que demain on ne retranchera pas absolument des hypothèques et autres suretés du droit civil? Il faut admettre que le pouvoir du législateur doit avoir des bornes, même lorsqu'il s'agit du règlement des faillites et banqueroutes. A notre humble avis, sa juridiction ne s'étend alors qu'aux matières qui appartiennent essentiellement à un système de faillite; et elle cesse du moment qu'il a pourvu à la disposition de l'actif et à la décharge du failli.

D. GIROUARD.

INTRODUCTORY LECTURE TO THE STUDY OF THE LAW.

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The science of jurisprudence, on the study of which it is our purpose to enter, is so vast and comprehensive in its range, and often, apparently, so contradictory and complicated in its details, that in order to avoid perplexity and confusion, we must, at the outset, take a survey of its general elements and prominent outlines. It is proper therefore, in this introductory lecture, that I should spread before you, as it were, a map of the extensive field we are about to explore. By pursuing this course we shall discover at the very threshold of our inquiries that law is not composed of a collection of heterogeneous and incongruous rules, dictated by the mere whim and caprice of the law-maker; but that it is a beautiful and harmonious system, devised by the profoundest wisdom and foresight, to regulate the multifarious rights and obligations arising from the complex relations of social life, and founded substantially on the great and immutable principles of right and wrong, inscribed on the mind of man by the hand of his Creator.

Law, in the most enlarged sense of the word, is that power which exercises its dominion over everything, both in the physical and moral world. Hence law is divided into physical and moral law. The former is despotic and resistless in its sway;—it

governs and controls everything in the material world, from the smallest particle of dust we tread upon, to the countless heavenly bodies that roll in illimitable space. The latter consists of rules of action for the guidance of man alone, as a moral, intellectual and accountable being. Although the precepts of the moral laws are obligatory and binding, yet man as a free agent, has the power of violating them, at his risk and peril. All nature is bound down to implicit obedience to irresistible laws, except man, who is left free to violate the special law given to him for the government of his moral conduct, because he acts under a fearful responsibility both here and hereafter. This moral or natural law is coeval with the human race, for history does not inform us of the existence of any people without it.

In the progress of society these original principles, or that primeval perception of right and wrong, were developed to meet the exigencies and wants of the people, and hence was gradually formed that regular system of laws, consisting of those rules of civil conduct, an observance of which can be enforced by the power of the State, and which is known by the appellation of the *Municipal* or *Civil Laws*.

But although the municipal law is, in the main, founded on and a mere development of the natural law, it must not be supposed that one is invariably conformable to the other. Motives of public policy, based on an infinite variety of considerations, frequently induce a people to adopt anomalous laws conflicting with those of nature.

Municipal Law is, in an enlarged sense, the expression of the whole public mind or conscience, either through the legislative department of the Government, or by the acquiescence of the people themselves, manifested by their acts and conduct. In the enactment of the written law the Legislature is the organ of the public mind; the unwritten or customary law is silently adopted by the people themselves. The law-making power is so inherent in the people that it never can be entirely wrested from them even by the most unmitigated despotism; for although the despot may, to a great extent, pervert and misrepresent the public mind, he cannot completely silence it. The history of every nation is replete with evidence of this important fact. When, for instance, under the regal government of Rome, arbitrary and oppressive laws, were enacted, repugnant to the public sentiment, the kingly power was subverted, and the Tarquins had to fly for their lives!

When, at a subsequent period, the patricians oppressed their fellow-citizens by unequal and tyrannical laws, the plebeians rose upon their oppressors; resumed the legislative power; abolished those odious distinctions which the usurpation of the aristocracy had introduced into the laws; and adopted that series of profoundly wise *plebiscita*, which still challenge our admiration! Even in her decrepitude and decay, when Rome was ruled with an iron rod, by the worst monsters that ever disgraced humanity, the public mind found an organ in the writings of those great lawyers, whose opinions obtained the force of laws and who built up and perfected that admirable system of jurisprudence which, by the common consent of mankind, has been honored by the appellation of written reason. Papinian was the contemporary of Caracalla, and was assassinated by that wretch, whose hands were still reeking with the blood of his brother, Geta, for refusing to write an apology for fratricide. The public mind of France was energetically, though silently, expressed in its customary laws, during the worst and most absolute tyranny of its kings. An attempt to stifle the expression of the public mind in its laws, brought Charles the First to the block. The same effort on the part of the narrow-minded and obstinate George III, lost him the brightest jewel in his crown. Within our own recollection, we have witnessed two crowned heads driven into exile by the same cause, Charles X, and Louis Philippe of France. These examples might be multiplied to an almost indefinite extent; but a sufficient number has been cited to fortify my position. Hence it is obvious that no individual, or set of individuals, can be permitted to oppose their conscientious scruples to the binding force and effect of a law, without a total subversion of the whole social fabric.

Municipal or Civil Law, in its technical sense, is a rule of civil conduct, prescribed by the law-making power, an observance of which can be compelled, and its violation punished, through the judiciary department of the government. The word *Civil* is here used in contradistinction to moral conduct: all *Civil* conduct is productive of legal rights and obligations.

All the serious concerns of life resolve themselves into rights, duties and obligations. It is the province of the law to define and protect legal rights, and to enforce the performance of legal obligations. The terms legal rights and obligations, are used in contradistinction to that class of imperfect rights and duties

defined and inculcated by the precepts of morality and religion, but of which jurisprudence takes no notice. To illustrate,—when I insure your property, I incur the obligation to pay the damages which I have caused, and you acquire the right of invoking the aid of the law to compel me to indemnify you; this is an example of a legal or perfect obligation and corresponding right. On the other hand I am under the moral obligation to be grateful to my benefactor; but if I neglect the discharge of that duty, the law cannot coerce me to perform it; and, therefore, the obligation is an imperfect one.

A legal right is the faculty or power of acting with regard to its object in conformity to law: *jus est facultas agendi.* I have a legal right to my watch; that is I have the power to do what I think proper with the watch; I may sell it; I may give it away; or I may even destroy it; but in the exercise of this faculty, I am not permitted to violate any law or rule of morality.

Legal rights are either personal or general: they are called personal when they have their origin in a corresponding legal obligation, incurred by a particular person, or a designated number of persons; they are general, when they exist independently of any personal obligation, and equally against the whole world. Thus, when I borrow a thousand dollars of you, your right to the return of the money arises out of the obligation which I have contracted in borrowing the money; consequently it is a personal right to be exercised against me alone. But if I am the owner of a house, you are bound to respect my right of property, and to refrain from doing any act that would be an infringement of my right of property, but this duty or obligation is not limited to you—it is equally binding on all other persons, my right is therefore general—*erga omnes.*

There are four essential elements in every legal right.

Firstly.—A person to whom the right belongs, or who is its active subject.

Secondly.—A thing which forms the *object* of the right, or with reference to which it exists.

Thirdly.—A fact or event which is the source or origin of the right, or by the happening or occurrence of which the right is created, and

Fourthly.—A judicial action to protect and enforce the right, and to make it efficacious and perfect.

The law regarded persons only with reference to their capabi-

lity of acquiring legal rights, and of incurring perfect obligations; if, therefore, a human being should be destitute of this capacity, he would not be considered as a legal person. Hence every natural individual is not necessarily a person, for without the capacity of acquiring rights and of incurring obligations, there is no legal person. This definition of what constitutes a legal person, of course applies only to the civil law terminology, for in the eye of the criminal law, every human being is viewed as a person without any regard to the capacity of acquiring rights or incurring obligations.

Persons are either natural, or merely juridical or fictitious; juridical persons are created by the law, they are legal abstractions, to which the law communicates the capacity of acquiring rights and of incurring obligations to this class of persons; belong all private corporations, such as banking institutions, insurance companies, as well as *hereditas jacens*, and many others.

Natural persons are subdivided into those who are in the untrammelled exercise of all their legal rights without the intervention of any other person or authority; and those who, on account of age, infirmity or body or mind, of in consequence of the relation in which they stand towards another person, are not permitted to exercise their legal rights without the co-operation, and in some cases exclusively through the agency, of another person. The latter class embraces minors, married women, and those who have been interdicted.

After having formed a general idea of persons, we must next direct our attention to the consideration of *things*, as the second essential element of rights. The law generally treats of things only so far as they are the object of legal rights, or as we observed before, a person is the *subject*, and a thing the *object* of every legal right.

In the same manner as persons are characterised by their capacity to have or acquire rights, to the term things comprehends whatever is susceptible of forming the object of a right. Here again the law exercises its power of abstraction, and creates things that have no existence in the physical world, things that are neither visible nor tangible.

In this last category of things, are included all obligations by which property is not directly and immediately transferred from one person to another. These things are called incorporeal: hence the great division of things into corporeal and incorporeal.

Whatever can be used to satisfy the wants, or conduce to the convenience or pleasure of man, is susceptible of forming the object of legal rights.

We have thus glanced at the *subject* and the *object* of legal rights; and this brings us to the inquiry how they are formed. It is evidently not sufficient that there should be a person with capability of becoming the *subject*, and a thing to be the *object* of a legal right, in order to create or give existence to that right: something else is requisite to call it into being; and that is the happening of some fact or event, which is the immediate or proximate cause of its creation or formation. Thus rights are acquired by contracts, quasi-contracts; offences, quasi-offences; inheritance, &c.

These are all facts, acts or events, without the occurrence or happening of some one of which no legal right can have any existence. It is therefore evident that there can be no question of law unconnected with a certain state of facts. When we say that a case presents nothing but a question of law, we only assume that the facts on which the law is to operate are admitted, or not disputed; for otherwise the assertion would involve a contradiction in terms. It is absolutely impossible that any practical question of law can arise without a particular state of facts.

This distinction between questions of fact and questions of law seems to be plain enough, and no lawyer who has studied his profession as a science, and whose knowledge of law is not exclusively empirical, can ever experience any difficulty in perceiving the obvious line of demarcation which divides them. Yet the Supreme Court of this State, in the case of Cammayer, decided in the May term of 1853, confounded a clear, unmixed question of law with a supposed question of fact. The case was briefly this; —Cammayer was prosecuted for the crime of larceny; after the evidence of the prosecution was closed, his counsel requested the District Court to charge the jury, that the facts proved, did not, in law, constitute the offence charged, *i. e.* larceny. This charge the judge refused to give, and a bill of exceptions was taken to the refusal, in which all the facts proved were incorporated, and certified by the District Judge. On the trial of the appeal, the only question to be decided by the Appellate Tribunal was, whether the state of facts set forth in the bill of exceptions, constituted the crime of larceny? That this was a dry, naked question of law, unmixed with any question of fact, would seem to be too evident to admit of controversy.

Nevertheless, the Court determined the contrary, and observed —" the jurisdiction of this Court extends to criminal cases on questions of law alone and if we were to examine the facts on which the jury found the verdict, in order to determine whether the Court below erred in refusing to charge them that those facts did not constitute larceny, we would certainly be exceeding our jurisdiction, and deciding on the facts as well as the law." That so glaring an error should have been committed by that high and enlightened tribunal is passing strange; that it should have been pertinaciously persisted in, when pointed out, is to be deplored.

But the concurrence of these three elements of rights (person, thing, fact), would frequently be of little avail if there were no means of effectually protecting and enforcing rights; this fourth and last element, which gives force and efficacy to the others, is called *action*. Legal action in its enlarged sense, means the exercise of the power of government through the judiciary for the vindication of rights and the enforcement of obligations. The definition of actions of the Roman Law has been copied almost literally into our Code—" *actio autem nihil aliud est, quam jus persequendi in judicio, quod tibi debetur.*" An action is the right given to every person to claim judicially what is due or belongs to him.

The history of actions, their various forms and ceremonies, in the gradual growth and development of the Roman jurisprudence, is one of the most curious and interesting subjects of inquiry. We shall have occasion to discuss this important matter in the progress of our labours; for it must be our constant endeavour to unite the theory with the practice of the law.

All rights may be classed under one of four divisions:

First.—Family rights.

Secondly.—Rights in and to things, or real rights.

Thirdly.—Rights arising from obligations; and

Fourthly.—Succession rights.

In the first division are included all those rights arising from the domestic relations, such as husband and wife, parent and child, master and servant, &c., &c.

The second comprises titles and claims of every description to things, whether moveable or immoveable.

Every obligation necessarily produces a co-relative right; hence the relation between debtor and creditor.

This class of rights constitutes the third division.

The last category of rights embraces those which have their origin in inheritance, either legal or testamentary.

Three of the elements of rights which have been thus faintly and imperfectly sketched, are developed and expounded in the Civil Code, and the last is treated of in the Code of Practice.

The Civil Code is divided into three books; each of which is devoted to one of these elements. The first, treats of persons; the second, of things and of the different modifications of the various rights that may be acquired in things; and the third, of the different modes of acquiring the property of things, or as we have stated, of facts, acts or events, by which rights are created.

Such is the simple and logical arrangement of the great heads of jurisprudence, adopted in the Code of Louisiana, which is the repository of the modern Civil Law, as contradistinguished from the Common Law which prevails in England, and in the other States of the Union.

A sort of rivalry seems to be carried on between ignorance, prejudice, and arrogance, for the purpose of depreciating the merits of the Civil Law. Indeed, most of those critics, while indulging in their unbounded and extravagant admiration of the Common Law, at the expense of the Civil Law, dogmatically deny that the latter has any merit at all. Lord Mansfield, whose great legal mind and splendid judicial labours contributed so largely to give something like shape and symmetry to the uncouth and rude materials of the Common Law, was vilified and abused by Junius, for resorting for instruction, to that pure fountain of legal science—the Roman Civil Law. Among other charges which he urges against him, he says.

"I see through your whole life, one uniform plan to enlarge the power of the crown, at the expense of the liberty of the subject. To this object, your thoughts, words and actions, have been constantly directed. In contempt or ignorance of the Common Law of England, you have made it your study to introduce into the Court, where you preside, maxims of jurisprudence unknown to Englishmen. The Roman Code, the law of nations, and the opinions of foreign civilians, are your perpetual theme; but whoever heard you mention Magna Charta or the Bill of Rights with approbation or respect? By such treacherous arts the noble simplicity and free spirit of our Saxon Laws were first corrupted. The Norman conquest was not complete until Norman lawyers had introduced their laws, and reduced slavery to a system. This

one leading principle directs your interpretation of the law, and accounts for your treatment of juries, etc."

The attractive and classic style of Junius has given currency to this groundless aspersion; but instead of being confined to the individual against whom it was directed, it has become fashionable to apply it to the Civil Law itself. Now Junius, with all his varied attainments, was either profoundly ignorant of the Roman Private Civil Law, or he was guilty of wilful misrepresentation.

Those who object to the Civil Law on the ground of its repugnancy to the principles of liberty, are evidently unacquainted both with its letter and spirit: the public or constitutional law of the Roman Empire, and the Senatus-Consulta, as well as the imperial rescripts in relation to the organization and administration of the Government, have never been in force in Louisiana, nor in any other country since the destruction of the imperial government: what has been preserved and handed down to our time, is the *private law*; and I should like to be informed in what respects that part of the Roman jurisprudence is hostile to the spirit of liberty. The admirers of the Common Law, are justly proud of that feature in it which secures the trial by jury; but some of them do not seem to know the fact, that the trial by jury formed a constituent part of the Roman Law, three centuries before Julius Cæsar conquered England; and at least six centuries before the Common Law had any existence.

The term *Judices* designates in general, says Bonjean, in his Treatise of Actions, vol. i, p. 164, § 72, the jurors to whom the Roman Magistrates referred the cognizance and consideration of cases, and to whom was delegated the power to decide them.

During the period of the Republic, these juries were known by the names of *judex-unus*, *arbiter*, *recuperatores*, *centumviri*, as the modern expression judge conveys the idea of a public functionary, we shall without hesitation use the word *jury:* there exists, besides, a striking analogy between the *judices* and our juries, for Cicero himself designates them by the appellation of *judices jurati*. De Lege Agraria. In the Common Law they are called *juratores*, an expression of doubtful Latinity.

As our juries, the Roman judices were simple citizens, called upon to decide cases submitted to them; their functions were essentially temporary, and limited to the case in which they were empanelled and sworn; when the suit was decided, they disap-

peared, and were lost in the crowd of their fellow-citizens. They generally only decided questions of fact, though in some instances they were authorised to judge of the law as well as of the facts. The Praetor, or other magistrate, laid down the rules of law applicable to the case, and directed the *judices* or jury to condemn or absolve the defendant in accordance to the state of facts which they might ascertain to exist. Our judges charge the jury as to the law, after the evidence has been closed and the argument heard; the Roman Praetor informed them of the law, before the inquiry into the facts was commenced. With us the judge presides at the trial of the case, decides incidental questions of evidence, etc., but is not present at their deliberations, nor has he even a casting vote in the rendition of the verdict; under the Roman law, after the judge had stated the law to the jury in writing, he did not participate any further in the trial of the case, but left its discussion entirely to them. *Gaius* iv: 46, 104, 105, 109, 141. Now, let me ask, what is the substantial difference between the trial by jury according to the Roman law, and that of the common law? Is it the cabalistic number twelve? But how do we know what was the precise number of the *recuperatores* or of the *centumviri*, empannelled and sworn in each case? We know that the *judex unus*, and the *arbiter*, acted generally alone, though the twelve tables speak of *tres arbitri;* but we have no reliable information of the number of *recuperatores* or *centumviri* who acted in each suit.

Another of the boasted excellencies of the common law is the *habeas corpus*, which was recognised by statute in the reign of Charles the Second; but this invaluable protection for the personal liberty of the citizen is derived from the civil law, and was familiar to the Romans, more than two thousand years before its permanent introduction into England, by the name of *Interdictum de libero homine exhibendo*, which was a laconic and stern command addressed by the judge to any individual who detained a freeman, to produce him instantly, *Quem libero dolo malo retines, exhibeas.* This writ was granted forthwith on the application of any person. D. 43, 29, 1 et seq.

No doubt the few fragments of the twelve tables that have come down to us, are stamped with the harsh features of their aristocratic origin. But the *jus honorarium*, established by the Praetors and other magistrates, as well as the Customary Law, which was built up principally by the writings and opinions of

the *prudentes*, are founded essentially on natural equity and justice, and breathe the most liberal spirit of equal rights in every line.

The Roman jurists always assume that the law-making power belongs to the people: the Emperors attempted to justify its exercise on the ridiculous pretext, that the people had voluntarily surrendered the legislative power, and vested it in them by the *lex regia*, by which they pretended the *imperium* was conferred on them. But this is a contemptible fiction invented by the flatterers of power.

It is an historical fact, that the Civil Law prevailed in England, and was publicly taught in her Universities, for more than three centuries. Nay, all the leading principles of the Common Law, except those relative to the titles and rights of real estate, can be traced to the Roman Law. The complex and artificial rules concerning titles and conveyances of immoveable property, had their origin and foundation in the feudal system, which has never been considered as distinguished for its tendency to promote or encourage the spirit of liberty.

But why was the Civil Law superseded in England? Why were its professors silenced in the University of Paris? Why was its quotation prohibited under the penalty of death in Spain? Surely not because its principles were repugnant to liberty; for when these events took place, England, France and Spain, were equally groaning under oppression and despotism.

Comparatively, anatomy is one of the most important branches of study to the physician; and I have often thought that the study of comparative jurisprudence would be of equal usefulness to the lawyer and the legislator. It seems to me that every Law School should have a chair to teach this special branch of legal learning.

Far be it from me, however, to say a single word in disparagement of the Common Law. It is, in the eloquent language of Judge Story, the law of liberty, and the watchful and inflexible guardian of private property and public rights. In a practicable point of view it is almost as necessary for a Louisiana lawyer to be acquainted with the doctrines of the Common Law as to be familiar with those of the Civil Code. Questions depending for their solution on the former arise daily in our tribunals, and the practitioner who is a mere *civilian*, is only half qualified for the efficient exercise of his profession. Eclecticism has been adopted

in many of the other departments of the moral sciences; why should the student of jurisprudence not avail himself of its advantages? Why should we not profit by the illustrious example of a Story, a Kent, a Mansfield, and a host of others? It is time that the narrow-minded and petty bickerings about the superiority of one system over the other should cease; sectarianism can find no permanent place in the science of jurisprudence.

It would be a great mistake to suppose that a knowledge of the Civil Law can be acquired by the study of the Louisiana Civil Code alone. Let us, therefore, direct our attention for a moment to the consideration of the best sources of information to assist us in our proposed course of study. When Louisiana was colonized by the French, in the early part of the eighteenth century, the custom of Paris was introduced as the Private Law of the colonists. At that period the northern part of the Kingdom of France was governed by a great variety of customs, none of which had been reduced to writing before the year 1510, during the reign of Louis XII. In the south of France the written law (droit écrit,) or Roman Law prevailed. But even in those provinces of the Kingdom, governed by customs, the Roman jurisprudence was resorted to as a subsidiary system to afford rules for the decision of cases not provided for by the customary law. About 1769, after the cession of the province of Louisiana by France to Spain, the Spanish Law was introduced by the celebrated Don Alexander O'Reilly. That system of laws is substantially identical in its leading general principles with the Roman Law as found in the compilations of Justinian. The Spanish Law was collected shortly after the dawn of the revival of learning into a number of Codes of different degrees of merit. By far the most perfect and complete of these Codes is that compiled under the auspices of Alphonso el Sabio, the learned, known as the *Siete Partidas*, published in 1263, but which was not authoritatively promulgated as the law of the land until 1348, in the reign of Alphonso XI.

Alphonso the Wise succeeded his father Ferdinand III, on the throne of Leon, and Castille, in the year 1252. He was entangled in a contest with Rodolphe of Hapsburg, for the German Empire, in which enterprise he failed. But during his competition for the imperial crown, and consequent absence from his Kingdom, the Moors invaded his territories, and to add to his misfortunes, he was dethroned by his own son Sanchez. He died broken-hearted at Seville, in 1282.

Mr. Schmidt, in his excellent, *Historical Outlines of the Laws of Spain*, justly observes, that "this Code is one of the most remarkable monuments of legislation of the middle ages, and which the Spaniards regard with the highest veneration, and as a model both of style, method and precept." It still continues to govern Spain, Mexico, and the whole of South America. But it cannot be denied that Alphonso borrowed nearly all that is really valuable at the present day in his collection, from the Roman Law. Many of its provisions bear the distinct impress of the age in which they were written, and refer to matters which are entirely foreign to a Code of Laws.

Although the Roman Law, as has been observed, was the original source whence nearly all the really and permanently important portions of the Spanish Law was extracted, yet instead of gratefully acknowledging their obligation, it has been asserted by some writers, that the Spanish law-makers had the egregious folly to prohibit their judges and lawyers, on pain of death, to quote or refer as authority to the fountain of their legislation. I have not been able to find, in the law containing the prohibition, the dreadful penalty for its violation. But be this as it may, the absurdity of the prohibition defeated the object which it was intended to accomplish, for the fear of death itself could not deter the Spanish Jurists from availing themselves of the accumulated wisdom of ages. Every effort to quench by force or fear the intellectual light which the human mind has once made its own, has been alike unsuccessful. When Galileo was released from the dungeons of the Inquisition because he had retracted his alleged heresy, he whispered to his friends who met him at the prison door, "*But the earth turns notwithstanding.*"

To the general student, the *Siete Partidas* are highly interesting, as evincing the early development and perfection of the Spanish language. The ordinary Spanish scholar experiences no difficulty in understanding the phraseology and diction of Alphonso the Wise, written in the middle of the thirteenth century. Few persons indeed can boast of being able to read with facility the English, French or Italian authors of the same period.

In 1808, a meagre and incomplete digest of the existing laws was published by the territorial government of Louisiana, which is known by the name of the Code of 1808, or the "Old Code." Notwithstanding this work, however, the Spanish Law continued in full force, in every particular, not differently provided for by

positive legislative enactments. For the purpose of enabling the citizens generally to acquire a knowledge of these laws, the legislature passed an act on the 3rd March, 1819. authorizing the printing and publication, at the expense of the State, of an English translation of that portion of *Los Siete Partidas* which was considered as having still the force of Law in Louisiana This translation was executed by Louis Moreau Lislet and Henry Carleton, both gentlemen of the New Orleans Bar, of respectable legal attainments; it was published in 1820, and is known as "Moreau and Carleton's Partidas." Though on the whole a tolerably faithful translation, it is not safe to place implicit confidence in its version, without comparing it with the original.

On the 14th of March, 1822, the Legislature passed a resolution, appointing three distinguished lawyers, namely—Edward Livingston, Louis Moreau Lislet, and Peter Derbigny, to suggest and propose additions and amendments to the Code of 1808, and report the same to the General Assembly. The jurists thus appointed presented the result of their labour in the incredible short period of one year; for their report was printed in 1823; the Legislature displayed equal zeal and diligence, in the discussion and adoption of nearly all the additions and amendments as proposed, during the Session of 1824. On the 12th April of that year, an act was passed to "provide for the printing and promulgation of the amendments made to the Civil Code of the State of Louisiana." It became the law of the State on the 20th June, 1825.

This extraordinary precipitancy, is, no doubt, the cause of many serious defects which are to be found in the work. One of the most serious of these defects is the imperfect and frequently incorrect translation into English of those articles which have been copied from the Napoleon Code; indeed the whole English text of the Code ought to be rewritten.

The Louisiana Code has, in a great measure, been transcribed from the Civil Code of France; it contains, however, many of the peculiar features of the Spanish Law. By the 3521st article of this Code, it is provided that—

"From and after the promulgation of this Code, the Spanish, Roman and French Laws, which were in force in this State, when Louisiana was ceded to the United States, and the acts of the Legislative Council, of the Legislature of the territory of Orleans, and of the Legislature of the State of Louisiana, be and are

hereby repealed in every case, for which it has been specially provided in this Code, and that they shall not be invoked as laws, even under the pretence that their provisions are not contrary or repugnant to those of this Code."

So that the Roman, Spanish and French laws still remained in force, as to all cases not specially provided for in the Louisiana Code. But in 1828 the Legislature passed an act expressly repealing those laws. It provides, that all the Civil Laws which were in force before the promulgation of the Civil Code, lately promulgated, be and are hereby abrogated, except so much of title tenth of the old Civil Code as is embraced in its third chapter, which treats of the dissolution of communities or corporations. Session Acts of 1828, p. 160.

Notwithstanding the general and sweeping character of this repealing act, the Supreme Court decided in the cases of Reynolds *vs.* Swain et al., 13 L. R. 198; Waters *vs.* Petrovic and Blanchard, 19 L. R. 591; that for the purpose of expounding legal principles and developing the doctrines of jurisprudence, the writings of the Roman and Spanish jurists might be consulted as safe guides, and their authority was entitled to respect.

From this imperfect sketch of the legal history of the country, it is evident that the principal foundation of the laws of this State, in civil matters is, the Roman Law; indeed there are but few principles enunciated in the Code, the origin of which cannot be traced to the Roman jurists. Hence it has always been conceded by all intelligent members of the profession, that the study of the Roman Law, in connection with our own Code, is indispensably necessary for a thorough understanding of the laws of Louisiana.

Besides, there are other advantages to be derived from the study of the writings of the Roman lawyers; in them alone do we meet with that admirable union of theory and practice; that concise yet clear exposition of principles, forcibly illustrated by their application to striking cases, for which we look in vain in the works of other writers.

Troplong, one of the greatest jurists and most philosophic minds of the age, observes, in speaking of the comparative excellence of the Roman Law and the Civil Code:

"Ulpian, Gaius, Papinian, and their compeers, will always stand at the head of the science for their excellent logic and their profound views; their comprehensive decisions, the firmness of

their judgment, the delicacy and sagacity of their perception, the analytical power of their minds, elevate them above all of whom I have any knowledge; and there is not perhaps in the Code a single article which can be compared, for precision, for force, and for beauty of style, with the innumerable fragments which Trebonian has extracted from their writings. Nor can we too highly appreciate their efforts to give predominance in the Roman Law, to those enlarged, generous, and liberal views which have their origin in natural equity, to which the Constitution of Rome was so long inaccessible. But that which they could only attempt the Code has fully realized. The Code, by a movement more active and more rapid, has gone beyond the progressive impulse which they originated. To them belongs the artistic perfection; to the Code, the philosophic perfection; and it is the latter which most concerns the citizen. Between the law which they have handed down to us, and that which is embraced in the Civil Code, there is all the difference which exists between Paganism and Christianity—between stoicism and Christian morality."

In the course of study which we propose to pursue, it is intended to combine, as far as possible, the dogmatical, the exegetical and the historical methods of teaching, for it is of equal importance to be acquainted with the text of the law, to understand its meaning and philosophy, and to know its origin and the modifications which it has undergone.

We shall, therefore, assiduously and diligently study the Code, in connection with the Roman, the Spanish, and the French Laws; we shall endeavor to ascertain the reason and intention of the law, and show its practical application to the concerns of life; and we shall trace, as succinctly and clearly as possible the source and development of the great principles of law.

In the execution of this plan, much assistance will be derived from the jurisprudence of the State, as settled by the decisions of the Supreme and other Courts. Jurisprudence, in the acceptation of the term as here used, consists in the concurrent and uniform exposition and application of the law by Courts of Justice; it exhibits as it were the whole vast and complicated machinery of the law in actual operation; and it has been not inaptly styled the *living law*. But while we acknowledge the great importance of this branch of legal learning, we must take heed not to lose sight of principles, in following the easy and beaten track of precedent. A mere *case lawyer* is like a third-

rate player, who repeats the words of others, without troubling himself whether he is uttering sense or nonsense. A well considered and well written judicial opinion, resting on sound and clearly developed legal principles, is a more efficacious method of communicating legal knowledge than any other that can be devised. But such is not always the character of the decisions of Courts of Justice; judges sometimes unwittingly indulge in freaks of fancy, or paradoxical propensities, to the utter disregard of the plainest principles of law; and then, their decisions instead of being safe guides are deceitful but solemn delusions, leading the confiding mind into error and confusion. The decisions of Courts should, therefore, be always studied in subordination to sound doctrine and correct principles.

Little or no advantage can be derived from the study of any work on the Roman law, written in the English language. We have not even a translation of the Pandects; the English version of the Institutes is inaccurate and imperfect. Strahan's translations of *Domat's Civil Law in its Natural Order*, is a work of great merit, though I cannot but think that the praise bestowed upon it by D'Aguessean is exaggerated. I would recommend it to your careful perusal as one of the best introductions to the study of the Civil Law. A new edition has lately been published of this work under the editorship of Professor Cushing, of Harvard University. It is neatly printed, but it has lost much of its value by the omission of the texts of the Roman law, which are interspersed in the original work as well as in the translation as published by Strahan. Editors frequently take great liberties with the productions which they edit, both in the way of omission and addition, but it is a custom more honoured in the breach than the observance.

At a more advanced stage of his course, the student cannot select a safer guide than Pothier, who was one of the first authors by whom jurisprudence was popularized, and who has had the glory of furnishing a large portion of the materials for the Napoleon Code.

The best Commentaries on that Code, and at the same time on our own, are those of Toullier, Troplong, Marcadé, and Duranton, all in the French language.

One of the best commentators on the Spanish Law is Gregoria Lopez, whose views and opinions have always commanded great respect. He has written in Latin, and elucidates the Spanish law, by constantly referring to the Roman jurisprudence.

The German legal literature has been enriched, during the last half century, by some of the greatest productions on the modern Civil Law, to be met with in any language. Savigny, Hugo, Gluck, and others, have conferred imperishable glory on their language and country, by their works on the Roman Law.

Nor ought he who is desirous of acquiring eminence at the bar, neglect to invigorate his mind, by the study of the great writers of the sixteenth century, such as Cujacius, Donellus, Duarenus, &c.;

I trust, gentlemen, that it is not necessary to urge anything further, to satisfy you that the study of jurisprudence is not so dry and uninteresting, as is generally imagined by those who are unacquainted with the subject. How can the study of that science be tedious or irksome, which embraces almost the whole circle of human knowledge? "*Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.*" "Jurisprudence is the knowledge of things divine and human, the science of what is just and unjust."

But where is the mind, it may be asked, of sufficient grasp and power to master this universal science? Candor compels us to confess that no such mind has ever existed, and in all probability never will exist. Excellence in the science of jurisprudence is only relative; no man ever was a perfect master of it. Human life is too short, the powers of the human mind are too weak, to acquire a thorough knowledge of everything a lawyer ought to know. The studies requisite to secure a respectable standing in the ranks of the legal profession are long and difficult; the exertions of him whose aim is loftier, must be proportionably greater. I would recommend to your careful consideration and faithful observance, the following general rules:

1. Permanent success in the profession of law cannot be hoped for without serious and persevering study and application. The aspirant to eminence in our profession should never forget that Themis is a jealous mistress, who will not permit her votaries to worship at any other shrine. He must also bear in mind, that the course of study and labour to which he devotes himself, is not limited to a certain number of years, but must be persisted in, without any interruption, to the last day of his professional life. From the first moment he enters on the arena of forensic strife, he will find himself surrounded by hundreds of competitors, eager to outstrip him in the race; while those who have

the start of him will use their utmost exertion not to be overtaken.

2. Without proper method and system in his studies, no one can obtain any proficieney in the knowledge of the law. An irregular and superficial conrse of reading will never make a lawyer. In the science of the law, as in all others, we must commence at the beginning; make ourselves familiar with general principles; understand the reason of every rule of law, and discover the connection and harmony existing between every part of the system.

3. The reading of books and listening to lectures will be of little or no advantage, unless the student digests what he reads or listens to, by thought or reflection. The mind, like the stomach, may be surfeited by being overloaded. Many a man and especially among members of the legal profession, has made himself absolutely stupid by too much reading. Reading is the means, thought and reflection the end; the former furnishes the materials on which the latter exercises themselves.

4. An indispensable requisite for the practising lawyer, is business habits. In a large commercial city, particularly, it is necessary for the practitioner at the bar to be familiar, at least, with the manner in which commercial transactions are conducted, he ought to be acquainted with accounts, book keeping, &c. Unless he possess this knowledge he will frequently be at a loss to understand the case stated to him by his client, and of course, utterly unable to argue it to the court or jury, as an advocate.

5. Ministering at the altar of justice, the moral character of the lawyer must not only be without a stain, but should be, like Cæsar's wife, above suspicion. Weight of character is frequently of more advantage in the argument of a cause than the greatest power of intellect. Judge Story truly observes "even the lips "of eloquence breathe nothing but an empty voice in the halls of "justice, if the ear listens with distrust or suspicion."

But the question will naturally occur to all who have made choice of this arduous profession, what probability is there of attaining an elevated rank in it? You may perhaps be discouraged by the reflection, that many are called, but few are chosen. My answer, gentlemen, to these objections is, that success depends almost exclusively on yourselves. If you resolve to become good lawyers, and use the requisite exertions to accomplish your end, depend upon it, you cannot and will not fail. Everything

depends on a firm, unfaltering and an indomitable will; let the word *impossible* be expunged from your vocabulary so far as your professional studies are concerned, and your efforts will be crowned with success. If on the other hand, you feel a lack of that energy and determination of which we have just spoken—if you prefer a life of listlessness and ease, the sooner you abandon the idea of studying and practising law, the better; turn your attention to some other and more congenial pursuit; and save yourselves from the mortification of remaining briefless lawyers all the days of your life.

In conclusion, I will quote the encouraging language of Prof. Story on a similar occasion:

"Enough has been said, perhaps more than enough, to satisfy the aspirant after judicial honours, that the path is arduous and requires the vigour of a long and active life. Let him not, however, look back in despondency upon a survey of the labour. The triumph, if achieved, is worth the sacrifice. If not achieved, still he will have risen by the attempt, and will sustain a nobler rank in the profession. If he may not rival the sagacity of Hardwicke, the rich and lucid learning of Mansfield, the marvellous judicial eloquence of Stowell, the close judgment of Parsons, the comprehensive reasoning of Marshall, and the choice attainments of Kent, yet he will by the contemplation and study of such models, exalt his own sense of the dignity of the profession, and invigorate his own intellectual powers. He will learn that there is a generous rivalry at the Bar; and that every one there has his proper station and fame assigned to him; and though one star differeth from another in glory, the light of each may yet be distinctly traced, as it moves on, until it is lost in that common distance, which buries all in a common darkness."

THE RIEL-SCOTT AFFAIR.

QUESTION.—Had the Dominion Government the power, or has it now the power, to take any legal steps to secure the punishment of Riel for the murder of Scott?

It is unnecessary to observe that except under the provisions of treaties—or for certain offences on the high seas—Canada could have no power to arrest or punish for crimes committed beyond her territorial limits: but it is alleged that under certain Imperial statutes passed for this particular purpose, jurisdiction was given to her, with reference to offences committed in the North West Territories beyond her limits—and that at the time of Scott's murder she had that power. It will be best, therefore, to see

1st. What that power was, to whom given, and where to be exercised.

2nd. Was such power transferred by the British North America Act of 1867, to the Dominion?

3rd. Could it have been executed before the occupation of and establishment of the Government of Manitoba?

4th. Since such occupation and establishment, constitutionally could it have been exercised in Manitoba?

5th. Under the Extradition Treaty with the United States, could or can Riel be demanded by the Dominion Government?

1st. In August, 1803, an Act was passed by the Imperial Parliament, known as 43 Geo. 3, c. 138, "for extending the jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the trial and punishment of persons guilty of crimes and offences within certain parts of North America *adjoining to the said* Provinces."

It recites that "whereas crimes and offences have been committed in the Indian Territories and other parts of America *not within the limits of the Provinces of Lower and Upper Canada, or either of them*, or of the Jurisdiction of any of the Courts established in these Provinces, or within the limits of any Civil Government of the United States of America—and are, therefore, not cognizable by any jurisdiction whatever—and by reason

thereof great crimes and offences have gone, and may hereafter go unpunished, and greatly increase." For remedy thereof it is enacted "That from and after the passing of that Act, all offences committed *within any of the Indian Territories or part of America not within the limits of Upper and Lower Canada*, or any Civil Government of the United States of America—shall be—and be deemed to be offences of the same nature, and shall be tried in the same manner and subject to the same punishment as if the same had been committed within the Provinces of Lower and Upper Canada."

The 2nd section then authorises the persons administering the Government of Lower Canada by commission, to empower any person or persons, wherever resident or being at the time, to act as Civil Magistrates and J. P's. for any of the Indian Territories or parts of America not within the limits of either of the said Provinces, or any Civil Government of the United States, as well as within the limits of either of the said Provinces, either upon information given within the said Provinces or out of them in any part of the Indian Territories or parts of America as aforesaid, for the purpose only of hearing crimes and offences—and committing any person or persons guilty of any crime or offence to safe custody in order to his being conveyed to Lower Canada to be dealt with according to law. And it is further provided that it shall be lawful for any person to apprehend such criminal and take him before the Commissioners, or to safely convey him to Lower Canada, there to be dealt with according to law.

The 3rd section provides that the party shall be tried in Lower Canada, as if the crime had been committed within the limits of that Province (or if the person administering the Government there thinks that in furtherance of justice, the party could be better tried in Upper Canada, he is authorised under the great seal of the Province of Lower Canada, to declare the same, and the party shall be tried in Upper Canada.) And similar power is given to issue subpœnas and other processes for enforcing attendance of witnesses in such Indian territories, as if the offence had been within the limits of the jurisdiction of the courts of Lower or Upper Canada.

The 4th and 5th sections have reference to foreigners, and do not bear upon this point.

In July, 1821, another Act was passed by the Imperial Parliament known as 1st and 2nd Geo. 4th, c. 66, "for regulating

the Fur trade and establishing a criminal and civil jurisdiction within certain parts of America."

The first four sections have no bearing. The fifth section extends the 43rd Geo. 3rd, c. 138, (just quoted) in its full extent to the Hudson's Bay Territories.

The 6th and 7th sections give the same jurisdiction, in *civil matters*, in the Indian territories to the Courts of Upper Canada, that the Courts of Lower or Upper Canada had within the limits of their respective Provinces.

The 8th section authorises the acting Governor of Lower Canada for the time being, *by Commission*, to authorise the persons who might be appointed J. P's. under that Act (1 and 2, Geo. 4, c. 66), in the Indian territories, etc., or who might be specially named in such Commission, to act as Commissioners to enforce in the Indian territories the orders of the Courts of Upper Canada, and in case of disobedience or resistance to such orders to commit the party disobeying, &c., to custody to be transmitted to Upper Canada, &c., there to be dealt with according to law.

The 9th section is in support of the 8th.

The 10th authorises the Queen to issue commissions to persons to act as J. P.'s in the Territories; and the Courts of Upper Canada may direct commissions to such J. P.'s so appointed to take evidence or try issues, or hold Courts, with like power and authority as are vested in the Courts of Upper Canada.

Down to this point the statute has reference to civil proceedings.

The 11th and 12th sections have reference to criminal matters. It is better to quote them in full:

"11th. And be it further enacted that it shall be lawful for "His Majesty, notwithstanding anything contained in this Act "or in any Charter granted to the said Governor and Company "of Merchant Adventurers of England trading to Hudson's "Bay, from time to time, by any Commission under the Great "Seal, to authorise and empower any such persons so appointed "Justices of the Peace, as aforesaid, to sit and hold Courts of "Record for the trial of criminal offences and misdemeanors and "also of civil cases, and it shall be lawful for His Majesty to "order, direct and authorise the appointment of proper officers "to act in aid of such Courts and Justices within the jurisdiction "assigned to such Courts and Justices in any such Commission,

"anything in this Act or in any Charter of the Governor and "Company of Merchant Adventurers of England trading to "Hudson's Bay to the contrary notwithstanding."

"Section 12—Provided always, and be it further enacted, that "such Courts shall be constituted as to the number of Justices "to preside therein, and as to such places within said Territories "of the said Company, or any Indian territories, or other parts "of North America as aforesaid, and the times and manner of "holding the same, as His Majesty shall from time to time order "and direct; *but shall not try any offender upon any charge or "indictment for any felony made the subject of capital punish-"ment,* or for any offence or passing sentence affecting the life of "any offender, or adjudge, or cause any offender to suffer capital "punishment or transportation, or take cognizance of or try any "*civil action* or suit, in which the *cause of such* suit or action "*shall exceed* in value the amount or sum of £200, *and in every "case of any offence subjecting the person committing the same "to capital punishment or transportation* the Court or any Judge "of any such Court, or any Justice or Justices of the Peace, "before whom any such offender shall be brought, shall commit "such offender to safe custody, and cause such offender to be "sent into such custody for trial in the Court of the Province of "Upper Canada."

It will thus be seen that under these two Acts, the power given was to arrest the murderer *to be sent to Canada for trial.* Under the first Act through the instrumentality of Justices of the Peace specially appointed by the Government of Lower Canada, and further under the 2nd Act through the instrumentality of local officers appointed by the Imperial Government. That the jurisdiction created is of a limited and exceptional character, and the legislation being of a criminal nature must be construed strictly. That the proceedings must be initiated by information before such J. P.'s or officers in the usual way, and to be in the same manner in every respect as if the offence had been committed within the jurisdiction of the Court of Lower or Upper Canada trying the same.

The next point is to see whether this power was by the British North America Act of 1867, transferred to the Dominion.

It will be borne in mind that the powers created by the two foregoing Acts were extra territorial powers given to Lower and Upper Canada separately to be exercised *in relation to the* Indian

Territories, the Hudson's Bay Territories, and certain parts of North America "*adjoining to the said Provinces*," a right not incidental to or necessary for *their* Government, or vesting in the said Provinces any interests in those Territories, but to be exercised solely for the benefit of those Territories themselves.

It becomes important now to see how this matter was disposed of by the Act of Union of 1841, and whether in the subsequent Act of 1867 any difference is made. The 3 and 4 Vic. c. 36, passed by the Imperial Parliament in 1840, intituled "An Act to reunite the Provinces of Upper and Lower Canada, and for the Government of Canada" declares by section 45 that all powers, authorities and functions which by the said Act (refering to George 3rd, c. 31, A.D. 1791,) or by any other *Act of Parliament*, or by any Act of the Legislature of the Provinces of Upper and Lower Canada respectively, are vested in, or are authorized, or required to be exercised by the respective Governors of the said Provinces . . . . . shall, in so far as the same are not repugnant to or inconsistent with the provisions of this Act, be exercised by the Government of the Province of Canada."

Section 46. "That all laws, statutes and provisions which at the time of the union of the Provinces of Upper and Lower Canada shall be in force within the said Provinces or either of them, shall remain and continue to be of the same force, authority and effect, &c., &c."

Section 47. "That all the Courts of Civil and Criminal jurisdiction in either of the Provinces of Upper and Lower Canada at the time of the union of the said Provinces and all legal commissions, powers and authorities, &c., shall continue to subsist, &c."

Now, in these sections there are no words of qualification as to the subject matter *relative to which* those powers are to be exercised. They were left as broad and as comprehensive as before the Act was passed, in no way curtailed or restricted, only the powers to be exercised were to be by United Canada instead of Upper and Lower Canada separately. But how is it when the same subject is referred to in the British North America Act of 1867 and the corresponding sections are examined. By the 12th Section of the British North America Act of 1867—under which Act alone the Dominion Government exists—the powers and authorities, and functions, which under any *Imperial* Acts or any

local Acts of the several Provinces were exercisable by their respective Governors, with the advice of their Councils at the time of the union were "as *the same* continued in existence and were capable of being exercised after the union *in relation to the Government of Canada*," transferred to and made exercisable by the Governor-General, &c. And by the 56th section all powers and authorities and functions, which under any such Acts, were at the time of the union vested in, or made exercisable by the Lieutenant-Governors of the Provinces, with the advice of their Councils, were "as far as the same were capable of being exercised after the union *in relation to the Governments of* Ontario "and Quebec respectively," vested in and made exercisable by the Lieutenant-Governors of Ontario and Quebec respectively.

(The 64th section had previously provided that so far as Nova Scotia and New Brunswick were concerned, the constitution of the Executive authority in each of these Provinces should, subject to the provisions of the British North America Act, continue as it existed at the union, until altered under the authority of the Act; and the Dominion of Canada was by the 3rd section formed of the then Provinces of Canada, Nova Scotia and New Brunswick, thereby defining its territory.) The 65th section thus clearly removes any doubt as to what was intended by the expression "*in relation to the Government of Canada*," in the 12th section; shewing that it was to be considered (as to the application of the powers referred to) in a territorial sense only. Otherwise the expression "in relation to the Government of Ontario and Quebec respectively" in the 65th section would be without meaning—or this absurdity would follow—that the Province of Lower Canada or the Province of Canada as composed of Upper and Lower Canada and inheritor of their powers by virtue of the Act of Union of 1841 (in contradistinction to its present organization under the Act of 1867, and its subsequent rights acquired under the Rupert's Land Act, 1868), would retain the power of appointing Justices of the Peace in and for the North-West Territories, and that criminals arrested there or in Manitoba, notwithstanding its present status, must still be brought to Upper Canada for trial; (inasmuch as those old Acts were not repealed in words, and under them the power to arrest for capital felonies gave no power of trial there.)

But the Act of 1841 was superseded by the Act of 1867, which expressly limited the powers conferred by any previous Imperial

Acts to the test of their "being *exercised in relation to the Government of Canada.*" The Canada of 1841 was reconstructed by the Act of 1867—with increased area—but curtailed local powers—with a different constitution clearly defined, and *an administration of criminal justice clearly distributed in a different way.* It was not contemplated that the abnormal mode of catching a criminal at the foot of the Rocky Mountains, and bringing him 2000 miles to Upper Canada for trial, should continue, and, therefore, no provisions were made in the Act of 1867, by which the jurisdiction created by the Imperial Acts of 1803 and 1821, and given to the Canada of 1841, should be continued to the Canada of 1867. It is true, the Acts of 1804 and 1821, were not repealed, because *there were provisions in them relating to other matters in the North-West Territories*, but express words were inserted in the Act of 1867, to negative even the presumption of the continuance of the criminal jurisdiction of Canada, and as preparatory to the altered circumstances which would necessarily follow from the acquisition of those territories. They were not left without law. "The Rupert's Land Act of 1868," is a clear recognition that there was law there, but that law it was not given to Canada after 1867 to administer, until she became the legal owner of the domain. This is the more apparent, because by an Imperial Act passed in 1859, the 22-23rd Vic. c. 26, intituled "An Act to make further provision for the "regulation of the trade with the Indians, and for the adminis-"tration of justice in the north-western territories of America," the same power with which Canada was then clothed, of having criminals arrested there and sent to Upper Canada for trial, was extended to British Columbia, and concurrent and equal jurisdiction given to the courts of that colony. Thus, when eight years afterwards in 1867, the British Parliament used the terms, "*in relation to the Government of Canada*," it was done with the full knowledge that it had already provided for the punishment of criminals in those territories by tribunals other than those of Upper Canada, *and in view of future arrangements, in defining the powers of the Federal Government of Canada*, it determined that those powers should correspond with its territory. Therefore at the time of the Scott murder the North-West Territories constituted no part of and were not under the jurisdiction of the Government of Canada, and Canada could not at that time appoint a Magistrate or arrest a man there. The subsequent

order in Council of June 23rd, 1870, under the Imperial Act,—"The Rupert's Land Act, 1868,"—from and after the 15th day of July, 1870, again gave jurisdiction to Canada (and outside of Manitoba which now stands on other grounds) the power of Canada to govern there and establish "laws, institutions and ordinances," now exists. Betweeen these two periods, July, 1867, and July, 1870, the administration of criminal justice there was in the hands of the authorities of the Hudson's Bay Company, of the British Government and of British Columbia.

This is the more clear because the same Rupert's Land Act of 1868, which gave to Canada the power, *after* the Order in Council to govern the territories, expressly provided that *until after* the date mentioned in such order, the Parliament of Canada enacted other laws, the existing laws and authorities *within* the territory should continue in force. Thus, to speak legally, the Canadian jurisdiction was destroyed by the act of 1867. The existing authority *within* was declared continued by the Act of 1868, and by the Order in Council of June, 1870, the authority of Canada was restored and made exclusive from and after the 15th July, 1870. Scott's murder was in December, 1869.

The 64th section declaring that the constitution of the executive authority in Nova Scotia and New Brunswick was to remain as before, &c., preceding immediately as it did the section which conferred executive powers upon the Government of Ontario and Quebec, also shews that the powers referred to were for local and not for extra territorial purposes.

This very significant distinction between the two acts of 1841 and 1867 indicates the intentions of the British Parliament in passing them.

It is plain, therefore, from the above limitations, that the powers which had been previously exercised by the Provinces of Lower and Upper Canada, or the Province of Canada after 1841 and previous to July, 1867, *in relation to the Indian and Hudson's Bay Territories* and "parts of America adjoining the two Provinces," under the Imperial Acts referred to, were not transferred by the British North America Act of 1867 to the Dominion Government;—no doubt designedly omitted, as the peaceful acquisition of those territories, and their constitutional incorporation into the Union were contemplated from its first inception.

The 3rd point it is not necessary to discuss, because it is an admitted fact that from the time of Scott's murder until the

bugles of the 60th sounded the advance upon the slopes leading to Fort Garry, the Dominion Government had not practically the power of enforcing any legal authority whatever in Manitoba or its vicinity.

As to the 4th: Since the establishment of constitutional government in Manitoba, which immediately followed the occupation of Fort Garry, the "administration of criminal justice" was by the British North America Act, vested in the Local Government, and the Dominion Government could not possibly interfere.

As to the 5th, under the above construction of the Imperial Act, the Dominion Government could have no legal right to demand the surrender of Riel. The British Gavernment alone had that power, as the offence was against her laws and not against those of the Dominion; but the authorities in the United States have always considered causes such as Riel's as political, and, therefore not coming within the scope of the treaty. It is true that judicially it has been considered that in order to exclude such from the treaty, it must be shown that the offence charged was in furtherance of the political object which it is alleged was sought to be obtained, and, we believe, that Scott's murder was not in furtherance of any such object, but the authorities to whom application would have to be made would be the judges, and no sane man can doubt what the decision would be. Leaving out, however, all question of details, which, in such cases, are numerous and complicated, an application by the Dominion Government for Riel's extradition under the Ashburton Treaty would be at once met by the objection that the crime was not committed *within the jurisdiction of the Dominion Government*, and, on other grounds, the demand would be declared inadmissible.

For these reasons, it does not appear to me that the Dominion Government could have taken or could now take any legal steps to secure Reil's punishment as long as he is abroad, but as there is no Statute of Limitations with reference to murder, assuredly should he ever come within the Dominion, justice will be found to reach him, and hands to take him.

I have placed the question solely in its legal aspect, merely as to whether the Dominion Government had, under the constitution, the right or not. I have avoided, as far as possible, even the insertion of a word which could have a political bearing, because I think that the point shoold be considered and determined without prejudice.

J. H. GRAY.

THE TREATY OF WASHINGTON.

The great problems of international law which were submitted to the consideration of the Joint High Commission are represented as having at last reached a solution. On the 8th of May the Commissioners signed, at Washington, a treaty by which they propose to settle the questions of the Alabama Claims, the Canadian Inshore Fisheries, the St. Lawrence Canals and other matters submitted to their investigation, upon bases very nearly the same as those which have been from time to time telegraphed to New York by correspondents of the press of that city, notwithstandind the alleged secrecy of the negotiations. The Treaty itself was to have remained secret for some time after its execution. But some of the Washington officials seem no more capable of keeping a secret than was the woman in the fable. The Treaty had scarcely been printed for the use of the Senate when secrecy was violated to favour a correspondent of a New York daily paper, and on the 10th of May that paper published to the world the entire text of the Joint High Commission's decision. It need scarcely be said that the conduct of the official who thus betrayed his trust, and the conduct of the correspondent who profited by his dereliction of duty, were equally dishonourable and disgraceful. It is needless to add that since that time no one concerned in the negotiations considers himself bound to secrecy. The text of the Treaty has made the round of the press of both continents; and almost all the interested parties, from the Legislative bodies down to the humblest village gazette, from the senator to the simplest fisherman of our maritime shores, have already discussed and criticised its stipulations. May we not be permitted to express in the *Revue Critique* an unbiassed opinion upon this novel and memorable Treaty?

It is true that the *Revue Critique* does not interfere with political questions. Its founders designed it to be a review devoted to legislation and jurisprudence. But is not the Treaty of Washington the draft of a legislative enactment much more important than most of the bills passed by the Legislature of the Dominion or by the Imperial Parliament? The *Revue Critique* could not, therefore, without failing in its mission, close its pages against a critical study of the Treaty in its bearing upon

law and justice. The essay which we lay before the reader has been written from a purely legal point of view, and in a spirit of freedom from all influence of passion, faction or political feeling, and we trust that it will be accepted as such by the public.

I.—THE ALABAMA CLAIMS.

In order that the reader may obtain a clear perception of the effect and scope of that part of the Treaty which relates to the Alabama claims, we will lay before him a historical sketch of this celebrated dispute.

At the close of the American civil war, Mr. Adams, the United States minister to Great Britain, in a correspondence with Earl Russell, beginning April 7, 1865, and closing with a letter of Nov. 3, 1865,* reviews the alleged failures of Great Britain to fulfil her obligations as a neutral, and demands compensation for the injuries resulting to the United States.

In his letter of April 7, Mr. Adams argues that formidable vessels of war have gone from British ports, and entered at once on their hostile career, without ever visiting a port of the Confederacy, the crews and armaments being British, as well as the vessels and their stores; that these have been procured by rebel agencies openly employed in Liverpool; that these acts have been in violation of our rights, and have been caused by the fact that Great Britain accorded belligerent rights to the rebels *in an unprecedented and precipitate manner*;† and that under the circumstances this amounted to a creation of the maritime belligerency of the rebels out of British materials, the result of which had been the gradual transfer of commerce from American to British flags and vessels.

Earl Russell (May, 1865) defends the course of Great Britain in recognising the belligerency of the South, and repudiates all liability for any actual or supposed consequences thereof. As to the building and equipping of vessels, he urges that the British Government had acted honestly and in good faith, and finally

* Dana's edition of Wheaton, Int. Law, 1866, contains a summary of this memorable correspondence, from which our statements are extracted.

† A former correspondence explains that by this was meant that Great Britain had recognized the South as a maritime belligerent before a single vessel of the Confederacy had reached a British port.

takes the ground "that if the Government does that, it is not answerable for the consequences if a vessel is fitted out and sails from Great Britain, *in violation of her laws*, and commits hostilities beyond her jurisdiction."

Earl Russell to Mr. Adams (Aug. 30, 1865) refuses to submit the matter to arbitration "on the ground that the decision of the umpire must depend upon the answer to two questions—*neither of which Great Britain could put to arbitration, with due regard to her own dignity and character*,—first, whether the Government has acted in good faith and with due diligence in executing its laws; and second, whether the law officers of the Crown properly understood the British statutes when they advised against legal proceedings."

Oct. 17, 1865: Mr. Adams says that "in view of the reasons assigned by the British Government for refusing an arbitration, no proposal of that kind for the settlement of existing differences will henceforward be insisted upon or submitted by the United States."

Nov. 3, 1865: Earl Russell proposes a Commission to settle any claims (not involving the two points specified) which the Governments might agree to submit to it.

Nov. 21, 1865: Mr. Adams to Earl of Clarendon gives the refusal of the United States Government to agree upon a Commission to settle particular claims between the two Governments arising out of the war, so long as Great Britain, for the reason she assigns, refuses to submit the great claims the United States are now urging.

Lord Clarendon to Mr. Adams, Dec. 2, 1865, declines to continue the correspondence.

From the date of this rupture public opinion began to discuss all the possible means by which the Anglo-American conflict on the Alabama claims might be brought to a solution at once just and equitable in itself and honourable to the two great interested powers. The Press and the Boards of Trade repeatedly agitated the matter. Every one seemed to agree in a desire to see it decided by arbitration. Mr. Westlake, in a letter addressed to the London *Daily News* (23rd January, 1868), points out, however, the extreme difficulty of finding an umpire who in a contest of this kind could be absolutely impartial. He, therefore, suggests that an International Congress would be more suitable to put an end to the dispute in a just and satisfactory manner. Dr.

Bluntschli, treating the same question in his last work on International Law, cites and approves the suggestion of Professor Lieber that it should be submitted for decision to the judgment of one of the most celebrated faculties of law.*

While individual plans of arrangement were being proposed and discussed, the authorities were not inactive. The negotiations re-opened between the Governments of Great Britain and that of the United States, resulted in the Clarendon-Johnson treaty of the 14th January, 1869, by which all claims brought forward since the Treaty of 1853 by subjects of Her Majesty against the United States Government, and by citizens of the United States against the Government of Great Britain, were referred to four Commissioners, "the high contracting parties engaging to consider the award of two arbitrators as a complete and definitive settlement of all claims brought against the one or the other of them upon matters anterior to the exchange of ratifications."†

When the Clarendon-Johnson Treaty was discussed in the United States Senate, the principal reproach made against it by Senator Sumner in his famous speech was that it treated a great question of national interest as if it were a wretched question of money, that it disregarded the most serious grievances of the American nation to take notice only of the private claims of a few merchants and shipowners. Mr. Sumner, in conclusion, expressed his confidence that a frank expression of regret by England for the wrongs committed by her against the United States should be a *sine quâ non* of a just reconciliation, and would be the best guarantee of that continued harmony between the sister powers, which must be the prayer of all. The Treaty was rejected by the American Senate by a majority of 54 to 1. (18th February, 1869.)

M. Rolin-Jaequemyns, speaking of that rejection, says that "what the United States have most at heart is a moral satisfaction," and he suggests the reparation of the wrong by means of an Act of Parliament embodying a new declaration of principles for the future, and an expression of regret for the past, *par voie d'acte du Parlement emportant une nouvelle déclaration de principes pour l'avenir, et l'expression d'une regret pour le passé.*‡

* Revue du Dr. Int. vol. 1, p. 154, 449.

† Ibid, vol. 1, p. 450–456.

‡ Ibid, vol. i, p. 449–456.

The action of the United States Senate was naturally ill calculated to calm the public mind. The tone of the American press grew every day more bitter, if not positively insolent. The Alabama question became a popular subject of controversy, and was continually debated on both sides of the Atlantic. While the excitement was at its height (in 1870), Dr. Bluntschli published in the *Revue de Droit International* his "*Opinion Impartiale sur la Question de l'Alabama et la manière de la résoudre*," which was deservedly reproduced by the European and American press, and appeared in the first number of the *Revue Critique* (January last). The conclusions at which he arrived are so much in accordance with the rules laid down by the Washington Treaty that we cannot forbear to place them again before our readers.

After having scouted the idea of an apology on the part of Great Britain from considerations of policy and not from legal motives—for, as he observes, a party who violates the law can and ought to avow it,—the learned professor concludes:

"I. The recognition of the Southern States as a belligerent power and the declaration of neutrality did not constitute a violation of international law by Great Britain and France. In deciding upon these steps, the European states only exercised their right, however serious may be the reasons to be urged against its expediency.

"Therefore, the United States, however disastrous the recognition may have been to them, are not justified in exacting from Great Britain or France a satisfaction or reparation, which could be demanded only in case the law had been violated.

"II. Taking it for granted that the accusations made against the English Government, with respect to the arming of the Alabama, and her undisturbed departure from an English port, are substantially true, a culpable non-fulfilment of the duties of a neutral and friendly State towards the Union presents itself, and on this ground the latter has a right to ask satisfaction and reparation from Great Britain.

"II. The owners of American ships and merchandise destroyed (by the corsairs) have no private claim for damages against the British Government, but the government of the Union can take charge of and protect their interests in the settlement of the pending dispute with Great Britain.

"IV. The true solution of the difficulty is to combine a material reparation, destined to indemnify the American claimants, with a moral guarantee to the commercial and shipping interests that similar injuries shall not be repeated. The first of these objects will be attained by means of a fair pecuniary indemnity paid by Great Britain to the Union, in order to be divided among the sufferers; the second by a new proclamation of the duty imposed on neutral and friendly States to prevent, as far as possible, any abuse of their neutral territories for the organization of military expeditions."

Finally, the message of President Grant to the Senate and House of Representatives of the United States, delivered on the 5th of December, 1870, and couched in the strongest language, added to the great mass of the Alabama difficulties, the questions of the Northern Inshore Fisheries, and the Free Navigation of the River St. Lawrence; and we cannot conceal from ourselves the fact that the Joint High Commission, entrusted with full power to sign any treaty settling all difficulties between the two Great Powers as it might see fit, was named under the effect of the Presidential message.

It must be admitted that the Fisheries and St. Lawrence Navigation questions should have been referred to another Commission than the one charged with the settlement of the Alabama claims. The Treaty of Washington, although not technically a treaty of peace, partakes of the nature of a treaty of peace, by reason of the menacing character of the Alabama claims; for, as Senator Sumner said in the Senate at Washington on the 19th of May last, "upon its ratification or rejection depends in a great measure the character of the relations which, in the future, will exist between the two governments." It is easy to understand that the feeling which should guide a Commission entrusted with the task of making reparation for a great international wrong, is not by any means the most desirable one in drawing up an equitable commercial treaty on the subject of the Fisheries and the St. Lawrence Navigation. The two matters are quite distinct, and are governed by very different principles; the one by the rules of the law of war, the other by the principles of friendly and reciprocal intercourse. They should, therefore, have been settled by different umpires and at different times. The settlement of the various Americo-Canadian disputes would, un-

doubtedly, offer a weightier assurance of justice, if, as the Dominion Government had demanded,* it had been the work of a Mixed Commission, composed of an English Commissioner, an American Commissioner and a Canadian Commissioner. Such an act of justice was due to Canada, more particularly in view of the fact that she had had no share, either active or passive, in the arming of the Alabama and other privateers, nor in any act hostile to the Government of the United States during the great civil war. Nay, more, the Canadian Government had maintained at great cost a military force upon the American frontier to protect it from raids by Southern refugees in Canada. In the affair of the St. Alban's Raid, it voluntarily hastened to make compensation for the damages sustained, although the raid, authorized as it was by the Confederate Government, had been organized with the greatest secrecy. This *semi-sovereign and irresponsible Government*—as the President's message sneeringly designates the Colonial Government—had, therefore, claims on the United States Government to a justice, free and disengaged from all political complications growing out of the foreign policy of the Mother Country. But the just policy of the Canadian Government has not met with the return which it deserved; and all that remains for us is to examine the Treaty in its clauses and its effects.

About the beginning of March last the Joint High Commission assembled at Washington. Of all their deliberations, from the 4th of March until the 3rd of May, 1871, nothing is known beyond what they thought fit to insert in the 36th protocol, of date the 4th of May.

The first protocol shows that the Commissioners determined that "the discussion might include such matters as might be mutually agreed upon."

The second shows that the Commissioners "proceeded with the consideration of the matters referred to them."

All the protocols, from the 3rd to the 34th inclusive, are precisely similar, and worded as follows: "The High Commissioners having met, the protocol of the Conference held on the —— was read and confirmed. The High Commissioners

* Annual Report of the Department of Marine and Fisheries (Ottawa, 1871), p. 75.

Return Correspondence between the Government of the Dominion and the Imperial Government on the subject of the Fisheries, p. 40.

then proceeded with the consideration of the matters referred to them. The Conference was adjourned to the —— of ——."

That private notes of the deliberations have been taken there can be no doubt; for otherwise the statement contained in the 36th protocol could not have been drawn up. A telegram of the 10th June informs us that Earl de Grey, Sir Stafford Northcote, Professor Bernard, Sir Edward Thornton and Lord Tenterden, at the conclusion of each day's session, made up a journal of the day's deliberations, which was at their leisure written out in full, so as to form a complete and accurate history of the progress of their labours, the different opinions expresssed in the formation of the different articles of the Treaty, as well as the construction which should be given to each portion of its articles. The telegram adds that the result of their labours, together with all books of reference, will be fyled in the British Foreign Office for future reference.

According to the 35th protocol, "the Joint High Commissioners determined that they would embody in protocol a statement containing an account of the negotiations upon the various subjects included in the Treaty, and they instructed the joint protocolists to prepare such an account in the order in which the subjects are to stand in the Treaty."

On the 4th of May, the High Commissioners met to receive the statement, prepared by the joint protocolists, in accordance with the request of the Joint High Commission at the last Conference.

From that statement contained in the 36th protocol, it appears that at the Conference held on the 8th day of March, the American Commissioners stated that the people and government of the United States felt that by the course and conduct (already stated) of Great Britain, "they had sustained a great wrong to an amount of about fourteen millions of dollars without interest, which amount was liable to be increased by claims which had not been presented;" that "they hoped that the British Commissioners would be able" to place upon record an expression of regret by Her Majesty's Government for the depredations committed by the vessels whose acts were now under discussion, and to agree upon a sum which should be paid by Great Britain to the United States in satisfaction of all claims and the interest thereon."

The British Commissioners answered that "Her Majesty's

Government, could not admit that Great Britain had failed to discharge towards the United States the duties imposed upon her by the rules of international law, or that she was justly liable to make good to the United States the losses occasioned by the acts of the cruisers; that they were instructed to propose on behalf of their Government the offer of arbitration."

The American Commissioners replied "that they could not consent to submit the question to arbitration unless the principles which should govern the arbitrator could be agreed upon."

These principles were submitted and discussed at the Conference of the 10th, 13th and 14th, but without result. Finally, at the Conference of the 6th of April, the British Commissioners admitted the principles under the reservations contained in the Treaty.

After having at the Conferences of the 6th, 8th, 9th, 10th and 12th April, considered the procedure to be followed by the arbitrators, the American Commissioners "referring to the hope which they had expressed on the 8th of March, inquired whether the British Commissioners were prepared to place upon record an expression of regret by Her Majesty's Government, to which inquiry the British Commissioners declared that they were authorized to express in a friendly spirit the regret felt by Her Majesty's Government for the escape, under whatever circumstances, of the Alabama and other vessels, and for the depredations committed by these vessels.." The American Commissioners accept this expression of regret as very satisfactory.

Articles 12 to 17 having reference to the private claims of British subjects and of American citizens, were agreed to, on the assurance of the British Commissioners that by the laws of England British subjects had long been prohibited from purchasing or dealing in slaves not only within the Dominions of the British Crown, but in any foreign country, and that they had no hesitation in saying that no claim on behalf of any British subject for slaves or for any property or interest in slaves would be presented by the Government. It was thus that the whole subject of the Clarendon-Johnson Treaty was summarily disposed of in a few hours, while more than a month was necessary to complete what Mr. Rolin-Jaequemyns terms *la satisfaction morale*, and what Mr. Sumner indicated as an avowal of wrong.

Articles 1 to 17 of the Treaty correspond to those decisions of protocol 36.

ARTICLE 1.—Whereas differences have arisen between the Government of the United States and the Government of Her Britannic Majesty, and still exist, growing out of the acts committed by the several vessels which have given rise to the claims generally known as the Alabama Claims, and whereas Her Britannic Majesty has authorized her High Commissioners and Plenipotentiaries to express, in a friendly spirit, the regret felt by Her Majesty's Government for the escape, under whatever circumstances, of the Alabama and other vessels from British ports, and for the depredations committed by those vessels; now, in order to remove and adjust all complaints and claims on the part of the United States, and to provide for the speedy settlement of such claims which are not admitted by Her Britannic Majesty's Government, the high contracting parties agree that all the said claims growing out of acts committed by the aforesaid vessels, and generally known as the Alabama Claims, shall be referred to a Tribunal of Arbitration, to be composed of five arbitrators, to be appointed in the following manner, that is to say:—The first shall be named by the President of the United States, one shall be named by Her Britannic Majesty, His Majesty the King of Italy shall be requested to name one, the President of the Swiss Confederation shall be requested to name one, and His Majesty the Emperor of Brazil shall be requested to name one.

The procedure to be followed by the arbitrators as well as the extent of their powers are minutely detailed in articles 1, 2, 3, 4 and 5. We find that the majority is empowered to decide,—the Treaty thus offering a new affirmation of the doctrine defended by Fiore and other publicists and invoked in the *Revue Critique* with regard to the Provincial Arbitration,—that in international arbitration the parties must establish by their compromise the mode of procedure and the limit of the powers granted to the arbitrators.

Articles 6 and 7 are as follows:

ARTICLE 6.—In decidiug the matters submitted to the arbitrators, they shall be governed by the following three rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case.

RULES.—A neutral Government is bound—

First: To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessels having been specially adapted, in whole or in part, within such jurisdiction to warlike use.

Secondly: Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly: To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules, as a statement of principles of international law which were in force at the time when the claims mentioned in Article 1 arose, but that Her Britannic Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that, in deciding the questions between the two countries, arising out of these claims, the arbitrators should assume that her Majesty's Government had undertaken to act upon the principles set forth in these rules, and the high contracting parties agree to observe these rules between themselves in future, and to bring them to the knowledge of other Maritime Powers, and to invite them to accede to them.

ART. 7.—The decision of the tribunal shall, if possible, be made within three months from the close of the argument on both sides. It shall be made in writing, and dated, and shall be signed by the arbitrators who may assent to it. The said tribunal shall first determine as to each vessel separately, whether Great Britain, by any act or omission, failed to fulfil any of the duties set forth in the foregoing three rules, or recognized by the principles of international law, not inconsistent with such rules, and shall certify such fact as to each of the said vessels. In case the tribunal find that Great Britain has failed to fulfil any duty or duties, as aforesaid, it may, if it think proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it; and in such case the gross sum so awarded shall be paid in coin by the Government of Great Britain to the Government of the United States at Washington, within twelve months after the date of the award. The award shall be in duplicate, one copy whereof shall be delivered to the agent of the United States for his Government, and the other copy shall be delivered to the agent of Great Britain for his Government.

All that precedes, relates only to the claims of the United States Government; claims made by citizens of the United States (exclusive of such as spring out of the depredations of the vessels mentioned in the 1st article), or by subjects of Her Majesty for causes arising out of the civil war, are provided for by article 12.

"ART. 12. The high contracting parties agree that all claims on the part of corporations, companies, or private individuals—citizens of the United States—upon the Government of Her Britannic Majesty, arising out of acts committed against the persons or property of citizens of the United States during the period between the 13th of April, 1861, and the 9th of April, 1865, inclusive (not being claims growing out of the acts of the vessels referred to in Article 1 of this treaty), and all claims with the like exception on the part of corporations, companies, or private individuals, subjects of Her Britannic Majesty upon the Government of the United States, arising out of acts committed against the persons or property of subjects of Her Britannic Majesty during the same period, which may have been presented to either Government for its interposition with the other, and which yet remain unsettled, as well as any other such claims which may be presented within the time specified in Article 14 of this treaty, shall be referred to three Commissioners, to be appointed in the following manner: that is to say, one Commissioner shall be named by the President of the United States, one by Her Britannic Majesty, and a third by the President of the United States and Her Britannic Majesty conjointly; and in case the third Commissioner shall not have been so named within a period of three months from the date of the exchange of the ratifications of this treaty, then the third Commissioner shall be named by the representative at Washington of His Majesty the King of Spain."

We may observe, *en passant*, that the private claims specially indicated in the Clarendon-Johnson Treaty as having been preferred since the Treaty of 1853 are not even alluded to in the Treaty.

Articles 8, 9, 10 and 11, as well as the whole of Articles 13, 14, 16 and 17, have reference only to the procedure and are of no special interest.

We must nevertheless remark that no rules of law are laid down for the guidance of the arbitrators, as in the case of the Alabama claims. They are instructed to "investigate and decide such claims in such order and in such manner as they may think proper," upon such proof or information as may be furnished them by or on behalf of the respective Governments (Art. 13). Thus they are *amiables compositeurs* rather than arbitrators.

Such are the provisions of the Treaty respecting the divers claims arising out of the American Civil War. They take effect from the day of exchange of ratifications at Washington or at London within six months after the date of the Treaty (8th May

1871). As this part of the Treaty makes no cession of territory or sovereignty, the consent of the British parliament is not required.*

To what conclusion should we come as to the value of this settlement of the Alabama claims? The English press has greatly extolled the arrangement as highly honourable; the American press is entirely satisfied with it; in Canada public opinion has pronounced with scarcely a dissenting voice that the interests of the Dominion have been sacrificed in order to obtain its execution. If by the word *honourable* it be meant that the Treaty is just and agreeable to the principles of international law, the Treaty may be admitted to be an honourable one. But if it means that the pretensions of Great Britain have been maintained the Treaty is as clearly a dishonourable one.

Bluntschli says of the apology demanded for these depredations of the Southern privateers: "A formal avowal of culpability, however praiseworthy a step when viewed from the standpoint of justice and morality, is inevitably felt by the nation in fault as an act of degrading weakness. This consideration alone suffices to prevent its being exacted from a great power."

The American Commissioners have not hesitated to demand this apology, which they have after some delay, succeeded in obtaining. The expression "in a friendly spirit of the regret felt by Her Majesty's Government for the escape *under whatever circumstances* of the Alabama and other vessels from British ports," will have the whole force of an apology, if the arbitration tribunal decides, (as there can be no doubt it will seeing that Great Britain has abandoned her legal pretensions,) that Great Britain has violated the rules of international law, and holds her responsible for the escape of the privateers.

In the second place, the American Commissioners have succeeded in wresting from the British Commissioners the recognition of the three rules of neutrality contained in article 6 as making in future a portion of public international law.

On this point again, Great Britain abandons all her arguments and principles. Until now she had constantly replied to the demands of the United States that her good faith protected her from the consequences of her acts. The Treaty, far from admitting that doctrine, has sanctioned the opposite one, which is but

* Forsyth Const. Law, pp. 182–187.

an application of the principle of the Roman Law that every one capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, omission, imprudence, neglect or want of skill.

It is true that Great Britain declares in the Treaty itself that she cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article 1 arose. What! these rules, which are based upon sound reason and not upon usage did not exist at the time of the escape of the Alabama and other cruisers! Is it because Great Britain has understood her duties only as defined by her own municipal laws? Clearly not. Her responsibility arises from international law and not from her own statutes and it is measured by the law of nations. Those statutes are only means to assist the State in fulfilling its international duties and cannot set any limit to these duties. The three rules acknowledged by the Treaty form an integral part of international law, not because the high contracting parties have been pleased to promulgate or proclaim them, but because they are founded on natural law. From the first, the United States maintained them both by the decisions of their Courts and by their diplomatic correspondence, and for centuries past jurists of the highest authority have proclaimed them as rules of international law. They are immutable and eternal truths; and to say that they were not in force in 1861 and down to the end of the American Civil War, is to admit in a disguised way that they were unknown to the English Crown law officers; it is to make a new mistake in disregarding the fact that international law everywhere is and always has been the same. A formal declaration that, at the time above referred to, the duties of neutrality were not understood in the manner laid down in the three rules in question would have been more exact and to the point. And finally, the consent given by Great Britain to the proposal that these three rules should be applied to all claims submitted to arbitration is a further proof of want of that frankness so honourable in every one, but especially so in a great nation.

Let us even suppose that these rules did not exist at the time of the escape of the Alabama. In proposing to give to the three rules a retroactive effect the English Commissioners are endeavouring to introduce into the law of nations an immoral principle of the most dangerous tendency. Dwarris, speaking of the retro-

activity of municipal law says: "A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law as to all cases of crimes and penalties, and in matters relating to contracts or property, would violate every sound principle."*

Retroactivity is manifestly a principle which cannot be recognized by a sound national policy, and it is to be hoped that the nations invited by the high contracting parties to recognize the three rules of neutrality will protest energetically against a precedent without example and without a name.

For the same reason, the recognition of the second rule cannot fail to precipitate a conflict between Prussia on the one hand and Great Britain and the United States on the other, on account of the supply, by the latter powers, of arms and military stores to France during the late war. Prussia, at the time, protested against such a practice, as being in flagrant violation of the laws of neutrality. Does not the Treaty of Washington necessarily involve an acknowledgement that Prussia was in the right? It says: "A neutral government is bound not to permit or suffer either belligerent to make use of its ports or waters for the purpose of the renewal or augmentation of military supplies or arms or the recruitment of men." The high contracting parties agree to observe these rules in future and to bring them to the knowledge of other maritime powers and invite them to accede to them. There can be no doubt that Germany will not only hasten to recognize these rules for the future, but will likewise invoke them with regard to the past, by representing to the high contracting parties that if the supplying of arms is under the circumstances recited, contrary to public international law in 1871, it must have been equally so in 1870, the rule being based not upon international agreements but upon reason and justice. So true is it that these rules of neutrality form part of the natural law that they have at all times been laid down by many text writers. Without desiring to make an extensive study of the point—which would lead us away from the subject of our article—we may cite Vattel. The first duty of a neutral state, he says is "to give no assistance when there is no obligation to give it, nor voluntarily to furnish troops, arms, ammunition, or anything of direct use in war." † Bynkershoek ‡ said before Vattel, that

* Dwarris on Statutes, vol. ii, p. 540.

† Liv. III, ch. 7, § 104. ‡ Quæstiones juris publici, I. 9.

"the enemies of our friends are to be considered in a twofold light, as our friends and our friends' enemies. If you consider them as friends, we may rightly aid and counsel them and may supply them with auxiliary troops, arms and other things which war has need of. But as far as they are our friends' enemies, it is not permitted to us to do this, for thus we should prefer one to the other in war, which equality in friendship—a thing to be specially aimed at—forbids." * Barbeyrac in his notes on Pufendorf (1712) expresses himself in nearly the same words.† "L'histoire de l'Europe" said Azuni in 1801, "fournit néanmoins des exemples de puissances, qui malgré leur neutralité déclarée n'ont pas cessé de fournir des troupes, des recrues, de l'argent, des munitions de guerre, et des approvisionnements de toute nature, propre à accroître la force d'un des belligérans. Ces exemples cependant ne sont concidérés que comme de vrais abus des droits de la neutralité, pratiqués par des nations qui se croient sûres de n'être point attaquées, pour raison des secours qu'on en tirait, soit à cause de leur situation avantageuse, soit à cause des garanties données et des complications de droits d'autres souverains, qui empêchaient qu'on ne les attaquât; c'est ainsi qu'on a vu souvent des nations rester exemptes du fléau de la guerre, quoiqu'elles n'eussent fait aucun traité spécial pour s'en garantir."‡

Finally the pretension of Great Britain that she was justified by international law in recognizing the South as a belligerent on the sea as well as on land, (a pretension which all publicists and among others Bluntschli have regarded as well founded.) has not been admitted. If we are to judge by the 36th protocol, it does not appear that this point was submitted to the attention of the Joint High Commission. This omission was the more important, that it may be doubted whether, under the Articles 6 and 7 declaring that the arbitrators shall be governed by the three rules "and by such principles of international law as are not inconsistent therewith," the United States cannot argue anew that Great Britain (independently of her duties as defined by the three rules) is responsible for her recognition of the South as a belligerent "in an unprecedented and precipitate manner."

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* See also Massé, Dr. Com. p. 145, 228.

† Le Dr. de la Nature, vol. 2, p. 461, n. 2.

‡ Dr. Mar., vol. 2, p. 46.

II.—THE FENIAN CLAIMS.

In closing our remarks on the recognition of the principles involved in the settlement of the Alabama claims, we cannot forbear expressing our surprise to see the Fenian question set aside without any resistance or serious remonstrance on the part of the British Commissioners. The Fenian claims have been officially presented by the Government of the Dominion to the Imperial Government. Of this there are abundant proofs, and a very recent one is to be found in the report of the Hon. A. Campbell's mission to London, dated 10th September, 1870. The following summary of his interviews with Lord Kimberley, *concerning the Fenian invasions and the troubles caused by them*, will, we are sure, be perused with interest:—

"Upon this subject I pointed out the troubles and losses which, during a number of years, had been caused to Her Majesty's subjects in Canada, by the Fenian marauders; that these men were American citizens, many of them not even Irish by descent; that they were enlisted, armed, and drilled in the large cities of the Union, under the orders of a Fenian Congress and Executive assuming the pretensions of a Government, the drilling occasionally even taking place in company with militia corps, under officers believed to hold commissions under the Government of the United States, the United States journals of the day giving the fullest publicity to everything which was being done. I described the Fenian invasions and repulse in 1866, and referred to the representations and the claim for indemnity made by Sir George Cartier and Mr. Macdougall on behalf of Canada to Her Majesty's Government with reference to the losses thereby caused, which were stated in a memorandum furnished to the Colonial Office by those gentlemen as amounting to several millions. I referred to the several alarms which had taken place since 1866, all attended with more or less injury to the country, and with more or less expenditure, and said that early in the present year the threatened invasion and the actual one had injured the country very much; that the loss with regard to industrial pursuits it would be difficult to estimate, and there had been a large expenditure in sending forward volunteers to meet the invading forces. The number of men sent out was about 6,000 in April, and in May about 12,000—these numbers would be equivalent to calling out 60,000 and 120,000 in England. In answer to an inquiry by Lord Kimberley I said that I could not state the actual military expenditure with any accuracy, but that up to the time I left Canada it was supposed to be somewhere between five hundred and eight hundred thousand dollars, and that whatever it was, it formed but a small portion of the loss sustained by the country. We thought a very strong case might be

made out for a demand for indemnity from the United States. Messrs. Cartier and Macdougall had asked that such a demand should be made with reference to the loss sustained in 1866, and we considered that we were entitled to ask for indemnity in reference to all the expenditure that had been since caused to us by the Fenians. Failing the obtaining of such an indemnity from the United States, we thought the Empire should join with Canada in meeting the losses; the Fenian difficulties were not of our creating, but grew out of real or imaginary wrongs that the Empire had in the past inflicted on Ireland, and we were fighting battles which were not ours but those of the Empire. We were quite ready, as a portion of the Empire, to bear our share of these or any other troubles in which the country might be involved, but it was not fair that we should be allowed to suffer alone all the losses and consequences of the Imperial acts or policy which were complained of, and I strongly urged that for the past and the future, should any further Fenian troubles arise, the Empire, as a whole, should bear the burden of resisting such attacks, and that Canada should only contribute as a portion of the Empire. Lord Kimberley suggested that the present generation of Canadians were as responsible for the alleged wrongs of Ireland as the present generation of the fellow subjects residing in Great Britain. Admitting this, I urged that the fair conclusion was that all alike, and not Canadians alone, should bear the losses and consequences of the course which had been in the past followed towards Ireland. His Lordship said it was impossible for him to dispose of the question, and he took for granted that I did not anticipate he would, but he would consider it himself and obtain early consideration of it by his colleagues, letting the Canadian Government know what view was taken."

That under these circumstances the Government of Canada has a right according to the rules of international law to an indemnity, it is needless to discuss.

Vattel said, nearly a century ago: "The nation or the sovereign ought not to suffer the citizens to do an injury to the subjects of another State, much less to offend that State itself."* This is, in fact, the rule of the Roman law above cited, which has passed not only into international law but also into the municipal laws of all civilized nations. It is, finally, the same principle which has been sanctioned by the three rules of the 6th article of the Treaty of Washington, with the single difference that with reference to the Fenian Question its application is extended to operations by land.

This general principle has further been formally recognized as

* Vol. 2, p. 165.

applying to hostile raids organized upon the soil of a neutral state. "A neutral State" says Rolin Jacquemyns,* "ought to abstain from favouring or tolerating—1st. The organization upon its territory of any band recruited for purposes of agression against a foreign State. 2nd. The fitting out in its ports of armed vessels intended to aid in any manner whatsoever any attempt at insurrection in the possessions of a foreign sovereign.

"These rules are not new; they are but the application of the immutable principle of justice that neutrality so long as it exists must be really and seriously enforced. But this is the first time that they have been formally proclaimed,† besides, it should be noticed with respect to the first rule, that it makes a distinction between "bands recruited" for purposes of aggression and persons who engage *individually* in an insurrection. The neutral State, it is plain, cannot be held responsible for the deeds of individuals whose liberty of action has escaped from her control; but the enlisting and assembling of troops, on the contrary, are marks of the exercise of sovereign power, and are suppressed by the laws of every State on whose soil and territory they are made. The State which does not put a stop to them becomes responsible. (V. Bluntschli, *das moderne Völkerrecht*, §§ 751 and 758.)"

Bluntschli, in his *Opinion Impartiale sur la Question de l'Alabama*, says:‡ "Nor can any State, in time of peace, permit hostile operations to be organized on her territory against a friendly State. Every State is bound to see that its territory does not become a base of operations for military enterprises directed against States with whom it is at peace. These universal international principles," adds the learned publicist, "are consecrated by the municipal law of England and America." The latter remark is so true that the Fenian General O'Neil and other chiefs of that organization were last year tried and condemned to imprisonment in the Sing Sing State Prison, for violation of the municipal neutrality laws of the United States in connection with the Fenian Raid of the preceding spring. But it cannot be pretended that such a punishment constitutes the totality of the penalty required by international law for such an open violation of neutrality.

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* Revue de Dr. Int., vol. i, p. 447.

† It was in 1869, by the Paris Conference, to settle the Greco-Turkish difficulty.

‡ Revue de Dr. Int., vol. ii, p. 452–485; Revue Critique, p. 20.

Finally, the principle from which we deduce the liability of the United States to make good the damage caused by acts of that kind is so plain that it was invoked by the American Government against the Canadian Government in the course of the civil war in the matter of the Confederate raids made into American territory from Canada. To be brief, we will cite only Major-General Dix's despatch (25th November, 1864) forwarded to the Government of Canada through the hands of the British Minister at Washington, which says: "Should not the Government of Canada be required through the medium of the British Minister to prevent by armed force the organization on British soil of marauding expeditions designed to pillage our frontier towns, which constitutes a violation of all the principles of international law." *

Returning to the negotiations of the Joint High Commissioners What have they decided with regard to the Fenian Claims? The following is the text of the official report:

"At the Conference on the 14th of April the Joint High Commission took into consideration the subject mentioned by Sir Edward Thornton in that letter. The British Commissioners proposed that a Commission for the consideration of these claims should be appointed, and that the Convention of 1863 should be followed as a precedent. This was agreed to, except that it was settled that there should be a third Commissioner instead of an umpire. At the Conference on the 15th of April the treaty articles, twelve to seventeen, were agreed to. At the Conference on the 26th of April the British Commissioners again brought before the Joint High Commission the claims of the people of Canada for injuries suffered from the Fenian raids. They said that they were instructed to present these claims and to state that they were regarded by Her Majesty's Government as coming within the class of subjects indicated by Sir Edward Thornton, in his letter of January 26, as subjects for the consideration of the Joint High Commission.

"The American Commissioners replied that they were instructed to say that the Government of the United States did not regard these claims as coming within the class of subjects indicated in that letter as subjects for the consideration of the Joint High Commission, and that they were without any authority from their Government to consider them. They, therefore, declined to do so. The British Commissioners replied that as the subject was understood not to be within the scope of the instructions of the American Commissioners, they must refer to their Government for further instructions upon it.

* Documents relating to the Southern Rebel Raids. Printed by order of the Canadian Parliament (1869) p. 35. See also Message of President Van Buren towards the end of 1838.

"At the Conference on the 3rd of May the British Commissioners stated that they were instructed by their Government to express their regret that the American Commissioners were without authority to deal with the question of the Fenian raids, and they enquired whether that was still the case. The American Commissioners replied that they could see no reason to vary the reply formerly given to this proposal; that in their view the subject was not embraced in the scope of the correspondence between Sir Edward Thornton and Mr. Fish, under either of the letters of the former, and that they did not feel justified in entering upon the consideration of any class of claims not contemplated at the time of the creation of the present Commission, and that the claims now referred to did not commend themselves to their favour.

"The British High Commissioners said that under the circumstances they would not urge further that the settlement of the claims should be included in the present Treaty, and that they had the less difficulty in doing so, as a portion of the claims were of a constructive and inferential character."

It must be admitted that such a mode of dealing is far from creditable to our neighbours of the Republic. Their Commissioners urge that they have no authority from their Government to consider the Fenian Claims. But if it had been intended to give us justice, nothing was easier for them than to ask further powers and instructions from the Washington authorities, under whose eyes the Commission was sitting. And lastly, did not the British and American Commissioners agree at their very first conference that the discussion might include such matters as would be mutually agreed upon? The conduct of the American Commissioners has been most unfair in this respect. But what is more astonishing is to see the British Commissioners declare that they had the less difficulty in yielding to this cavalier refusal as a portion of the claims were of a "constructive and inferential character." The British Commissioners had the less excuse for giving way, since the lawless acts of which we complain were not caused by any fault of the people of Canada, but by the wrongs —to-day acknowledged and partly remedied—inflicted by England upon Ireland.

We may here remark that as the Treaty covers only the claims which arose during and by reason of the American civil war, it does not debar the British Government from pressing, at any future time, the Fenian Claims which arose at a subsequent period.

III.—THE FISHERY QUESTION.

Under the Treaty of 1818, which governs the relations of American citizens to the Fisheries of the British North American Provinces since the abrogation of the Reciprocity Treaty, Canada has constantly contended that the prescribed limit of three marine miles as the line of exclusion, should be measured from headland to headland. The United States Government contended that it should be measured from the interior of the bays and sinuosities of the coast. In support of the Canadian view, appeal was confidently made as well to the precise language of the Convention as to the established principles of international law.*

It does not appear that the headland dispute was considered by the Joint High Commissioners in its relation to international law and the Convention of 1818. This omission is the more to be deplored, because if the Treaty be not ratified, and at all events when it is abrogated, the long pending and vexatious controversies which the Commission should have settled, will again break out and form an additional element of exasperation.

At the opening of the negotiations, the British Commissioners suggested that these differences should be merged in a liberal and judicious trade arrangement, but the American Commissioners peremptorily refused to hear of such a proposition; and finally a compromise was effected, in terms so unfair and unreciprocal (say the Canadians) that it assumes the character of a free gift or abandonment of our Fisheries. But not to prejudice the reader's mind, let us first lay before him the official report of the deliberations, and their ultimate result in the text of the Treaty.

The 36th protocol says:

"At the Conference on the 6th of March, the British Commissioners stated that they were prepared to discuss the question of the Fisheries, either in detail or generally, so as either to enter into an examination of the respective rights of the two countries under the Treaty of 1818 and the general law of nations, or to approach at once the settlement of the question on a comprehensive basis.

"The American Commissioners said that with the view of avoiding the discussion of matters which subsequent negotiation might render it unnecessary to enter into, they thought it would be preferable to adopt the latter course, and inquired what in that case would be the basis which the British Commissioners desired to propose.

* See supra pp. 36–68, where the question is discussed at length.

"The British Commissioners replied that they considered that the Reciprocity Treaty of June 5, 1854, should be restored in principle.

"The American Commissioners declined to assent to a renewal of the former Reciprocity Treaty.

"The British Commissioners then suggested, that if any considerable modification were made in the tariff arrangement of that trade, the coasting trade of the United States and of her Britannic Majesty's possessions in North America should be reciprocally thrown open, and that the navigation of the river St. Lawrence and of the Canadian canals should be also thrown open to the citizens of the United States on terms of equality with British subjects.

"The American Commissioners declined this proposal, and objected to a negotiation on the basis of the Reciprocity Treaty. They said that that treaty had proved unsatisfactory to the people of the United States, and consequently had been terminated by notice from the government of the United States, in pursuance of its provisions. Its renewal was not in their interest, and would not be in accordance with the sentiments of their people. They further said that they were not at liberty to treat of the opening of the coasting trade of the United States to the subjects of Her Majesty residing in her possessions in North America.

"It was agreed that the question relating to navigation of the River St. Lawrence, and of Canadian canals, and to other commercial questions affecting Canada, should be treated by themselves. The subject of the Fisheries was further discussed at the Conference on the 17th, 20th, 22nd and 25th of March. The American Commissioners stated that if a value of the inshore fisheries could be ascertained, the United States might prefer to purchase for a sum of money the right to enjoy in perpetuity the use of these inshore fisheries in common with British fishermen, and mentioned one million dollars as the sum they were prepared to offer.

"The British Commissioners replied that this offer was, they thought, wholly inadequate, and that no arrangement would be acceptable of which the admission into the United States free of duty of fish the produce of the British fisheries did not form a part, adding that any arrangement for the acquisition by purchase of the inshore fisheries in perpetuity was open to grave objections.

"The American Commissioners inquired whether it would be necessary to refer any arrangement for purchase to the Colonial or Provincial Parliament.

"The British Commissioners explained that the fisheries, within the limits of maritime jurisdiction, were the property of the several British colonies, and it would be necessary to refer any arrangement which might affect colonial property or rights to the Colonial or Provincial Parliaments, and that legislation would also be required in the Imperial Parliament. During these discussions the British Commissioners contended that these inshore fisheries were of great value,

and that the most satisfactory arrangement for their use would be a reciprocal tariff arrangement and reciprocity in the coasting trade.

"The American Commissioners replied that their value was overestimated; that the United States desired to secure their enjoyment, not for their commercial or intrinsic value, but for the purpose of removing a source of irritation, and that they could hold out no hope that the Congress of the United States would give its assent to such a tariff arrangement as was proposed, or to any extended plan of reciprocal free admission of the products of the two countries; but that inasmuch as one branch of Congress had recently more than once expressed itself in favour of the abolition of duties on coal and salt, they would propose that coal, salt and fish be reciprocally admitted free, and that inasmuch as Congress had removed the duty from a portion of the lumber heretofore subject to duty, and the tendency of legislation in the United States was towards the reduction of taxation of duties in proportion to the reduction of the public debt and expenses, they would further propose that timber be admitted free from duty, from and after the 1st of July, 1874, subject to the approval of Congress, which was necessary on questions affecting import duties.

"The British Commissioners at the conference on the 17th of April stated that they had referred this offer to their government and were instructed to inform the American Commissioners that it was regarded as inadequate, and that her Majesty's government considered that free lumber should be granted at once, and that the proposed tariff concessions should be supplemented by a money payment.

The American Commissioners then stated that they withdrew the proposal which they had previously made of the reciprocal free admission of coal, salt and fish, and of lumber, after July 1, 1874; that that proposal had been made entirely in the interest of peaceful settlement, and for the purpose of removing a source of irritation and anxiety; that its value had been beyond the commercial or intrinsic value of the rights to have been acquired in return, and that they could not consent to an arrangement on the basis now proposed by the British Commissioners, and they renewed their proposal to pay a money equivalent for the use of the inshore fisheries. They further proposed that in case the two governments should not be able to agree upon the sum to be paid as such an equivalent, the matter should be referred to an impartial Commission for determination.

"The British Commissioners replied that this proposal was one on which they had no instructions, and that it would not be possible for them to come to any arrangement, except one for a term of years and involving the concession of free fish and fish oil by the American Commissioners; but that if free fish and fish oil were conceded they would inquire of their government whether they were prepared to assent to a reference to arbitration as to money payment.

"The American Commissioners replied that they were willing, subject to the action of Congress, to concede free fish and fish oil as an

equivalent for the use of the inshore fisheries, and to make the arrangements for a term of years; that they were of opinion that free fish and fish oil would be more than an equivalent for these fisheries, but that they were also willing to agree to a reference to determine that question and the amount of any money payment that might be found necessary to complete an equivalent. It being understood that legislation would be needed before any payment could be made.

"The subject was further discussed in the conferences of April 18 and 19, and the British Commissioners, having referred the last proposal to their government, and received instructions to accept it, the treaty articles 18 to 25 were agreed to at the conference on the 22nd of April."

ART. 18. It is agreed by the high contracting parties that, in addition to the liberty secured to the United States fishermen by the Convention between the United States and Great Britain, signed at London on the 20th day of October, 1818, of taking, curing and drying fish on certain coasts of the British North-American Colonies, therein defined, the inhabitants of the United States shall have in common with the subjects of Her Britannic Majesty, the liberty, for the term of years mentioned in Article 33 of this Treaty, to take fish of every kind, except shell-fish, on the sea coasts and shores and in the bays, harbours, and creeks, of the Provinces of Quebec, Nova Scotia and New Brunswick, and the colony of Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the said coast, and shores, and islands, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish. *Provided*, That in so doing they do not interfere with the rights of private property, or with the British fishermen in the peaceable use of any part of the said coasts in their occupancy for the same purpose. It is understood that the above mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all other fisheries in rivers and the mouths of rivers, are hereby reserved exclusively for British fishermen.

Article 19 is a repetition verbatim of the foregoing one with this difference that it gives to British subjects the liberty to fish in common with the citizens of the United States on the eastern sea coasts and shores of the United States north of the 39th parallel of north latitude, subject to the same restrictions as are contained in Article 18 with regard to the liberty of fishing on our coasts.

Article 20 declares that the mode of designating the places reserved from the common right of sea-fishing shall be the same as indicated in the Reciprocity Treaty (Art. 1st.)

ART. 21. It is agreed that for the term of years mentioned in Article 33 of this Treaty, fish oil and fish of all kinds, except fish of the inland lakes and of the rivers falling into them, and except fish preserved in oil, being the produce of the fisheries of the United States or of the Dominion of Canada, or of Prince Edward's Island, shall be admitted into each country respectively free of duty.

ART. 22. Inasmuch as it is asserted by the Government of Her Britannic Majesty that the privileges accorded to the citizens of the United States, under Article 18 of this Treaty, are of greater value than those accorded by Articles 19 and 21 of this Treaty to the subjects of Her Britannic Majesty, and this assertion is not admitted by the Government of the United States, it is further agreed that Commissioners shall be appointed to determine, having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty as stated in Articles 19 and 21 of this Treaty, the amount of any compensation which, in their opinion, ought to be paid by the Government of the United States to the Government of Her Britannic Majesty, in return for the privileges accorded to the citizens of the United States and Article 18 of this Treaty; that any sum of money which the said Commissioners may so award shall be paid by the United States Government in a gross sum within twelve months after such award shall have been given.

ART. 23. The Commissioners referred to in the preceding Article shall be appointed in the following manner, that is to say:—One Commissioner shall be named by the President of the United States, one by Her Britannic Majesty, and a third by the President and Her Britannic Majesty conjointly; and in case the third Commissioner shall not have been so named within a period of three months from the date when this Act shall take effect, then the third Commissioner shall be named by the Representative at London of His Majesty the Emperor of Austria and King of Hungary. In case of the death, absence, or incapacity of any Commissioner, or in the event of any Commissioner omitting or ceasing to act, the vacancy shall be filled in the manner herein before provided for, making the original appointment, the period of three months in case of each substitution being calculated from the date of the happening of the vacancy. The Commissioners named shall meet in the city of Halifax, in the Province of Nova Scotia, at the earliest convenient period after they have been respectively named, and shall, before proceeding to any business, make and subscribe a solemn declaration that they will impartially and carefully examine and decide the matters referred to them to the best of their judgment and according to justice and equity, and such declaration shall be entered on the record of their proceedings. Each of the high contracting powers shall also name one person to attend the Commission as his agent to represent it generally in all matters connected with the Commission.

ART. 32. It is further agreed that the provisions and stipulations of

Articles 18 to 25 of this Treaty, inclusive, shall extend to the Colony of Newfoundland, so far as they are applicable. But if the Imperial Parliament, the Legislature of Newfoundland, or the Congress of the United States shall not embrace the Colony of Newfoundland in their laws enacted for carrying the foregoing Articles into effect, then this Article shall be of no effect; but the omission to make provision by law, to give it effect, by either of the legislative bodies aforesaid, shall not in any way impair any other articles of this Treaty.

ART. 33. The foregoing articles, 18 to 25, inclusive, and Article 30 of this Treaty, shall take effect as soon as the laws required to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada, and by the Legislature of Prince Edward's Island, on the one hand, and by the Congress of the United States on the other. Such assent having been given, the said articles shall remain in force for the period of ten years, the date at which they may cease to operate, and further, until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said period of ten years or at any time afterward.

We may remark that the Treaty rejects the principle of international law upheld by the United States Government since many years, namely, that the Convention of 1818 had been swallowed up and ended by the Reciprocity Treaty of 1854 and that the only compact in force between Great Britain and the United States was Article 3 of the Treaty of 1783.*

Article 18, in fact, contains by way of recital the words "in addition to the liberty of fishing secured to the United States fishermen by the Convention between the United States and Great Britain, signed at London on the 20th day of October, 1818, of taking, curing and drying fish on certain coasts of the British North American Colonies therein defined," and thereby recognises in the most unqualified and positive manner, that the Convention of 1818 is still in force, and will continue to be in force concurrently with the Treaty of Washington. And, therefore, the estimation of the value of fisheries on the coasts of Labrador and Newfoundland, cannot be taken into consideration by the arbitration tribunal.

It is not unimportant to take note of this formal admission on the part of the United States; for it will not be without weight,

* American Law Review, April, 1871; Dana on Wheaton, § 274, p. 350.

whether the Treaty be ratified or rejected, when—and that at no distant day—American legists will repeat with redoubled zeal and assurance the arguments of the American Law Review and of Dana in his Notes on Wheaton's International Law.

A more delicate point is, whether the cession of the Fisheries disposes of the headland dispute. This question is one of great practical importance: for in order to determine the value of our Fisheries within the meaning of Article 22, an understanding must be arrived at as to their extent; as to whether they do or do not stretch out three miles off the coasts and bays, from a line measured from headland to headland. An opinion entertained pretty generally by the Canadian press, and which is partaken by more than one distinguished member of the legal profession is, that the question has not been settled. Mr. Blake, a well-known lawyer and politician of Ontario, has asserted, perhaps in a moment of thoughtlessness,* that the question as to "the legal claim to the three mile limit from headland to headland, had not been settled by the Commission. There was no declaration in the Treaty as to what were the rights of the United States. So that in fact they had determined to sell the Fisheries without determining first what they had to sell."

In our humble opinion, the question is not to know whether the headland dispute has been settled by the Treaty, according to the true principles of international law; it is to know what is the extent of the concession which Great Britain makes to the United States by Article 18; and assuredly there cannot be two opinions on this point. First, the sole right alleged by the United States in Article 18, is their actually existing and undisputed right of fishing on certain portions of the coast indicated by the Convention of 1818. That Convention does not contain a syllable concerning the right of fishing inside the limit of three miles from the bays and windings of the coast without regard to headlands. Secondly, Article 18 grants to them "liberty to fish on the sea-coasts and shores, and in the bays, harbours and creeks of the Provinces, without being restricted to any distance from the shore." Such is the extent of the privilege which is accorded to the United States fishermen by the Treaty, and it must be admitted that it could not be more clearly defined. This definition

* In a speech at a Reform dinner some days after the publication of the Treaty. (Montreal *Gazette*, 23rd May, 1871.)

comprises the privilege of fishing within three miles of the bays, from headland to headland; and as it is this grant the value of which must be estimated under Article 22 and 23, the arbitrators must necessarily value our Fisheries according to that definition. Thirdly, Article 22 declares that the arbitrator shall make an estimation not of the Fisheries of the Dominion of Canada, but of the value of the privileges accorded to the citizens of the United States under Article 18 of this Treaty, "having regard to the privileges accorded by the United States to the subjects of Her Britannic Majesty as stated in Articles 19 and 21." This language is so precise as to render all comment unnecessary.

This latter Article (21) declares "that fish oil and fish of all kinds, *being the produce of the Fisheries of the United States* or *of the Dominion of Canada* shall be admitted into each country respectively *free of duty*."

It has been asked whether fish taken by Canadian fishermen outside the Dominion fishing-grounds in the open sea or on the United States fishing grounds can enter into the United States free of duty.

In our humble opinion, there can be no doubt that fish caught in the open sea is not free of duty; for the Article declares distinctly that it is only fish *being the produce of the fisheries of the United States or of the Dominion of Canada* which shall so enter free of duty.

Does the same remark hold good of the fish caught in American waters? It would at first perusal seem that the wording of the Article authorises the admittance free of fish being the produce of the fisheries of the two countries. Still the disjunctive *or* instead of the conjunctive *and* ("the produce of the United States *or* of the Dominion") followed by the words "shall be admitted into *each* country (instead of both countries) RESPECTIVELY," seems to reject such an interpretation. Besides it is a general principle in matters of tariff that duties as well as exemption from duties applies only to foreign produce, and further, the expression "admitted" conveys the same idea, that of importation, for in a legal sense a State cannot be understood to admit the products of her own territory since they already form part thereof.

Such was also the conclusion at which the United States arrived under the Reciprocity Treaty. Article 2 of that Treaty gave "to British subjects the liberty to fish on the eastern coasts

of the United States north of the 36 parallel of North latitude." Article 3 declared: "It is agreed that the Articles enumerated in the schedule hereunto annexed, (among which were fish of all kinds, products of fish and of all the creatures living in the water) being the growth and produce of the aforesaid British Colonies or of the United States, shall be admitted into each country respectively, free of duty."

The following is the interpretation given by the Washington authorities to the latter Article:

"On an application," says Andrews,* "for the free admission of certain products of the British North American Provinces, imported into the United States from Havana and London, the Revenue Department decided that they could not be so admitted and that the Articles, *if of the production of the North American British Provinces* and designated as free in the Treaty, would be entitled to the privilege of free entry only when imported directly from those Provinces into the United States." Thus under the Reciprocity Treaty, fish caught by British subjects in American waters, were not free of duty when brought into the United States market. This fact is worthy of attention.

The Treaty of Washington with respect to the Fisheries requires ratification by the Imperial Parliament, the Parliament of Canada, the Parliament of Prince Edward Island and the Congress of the United States.

During the progress of the deliberations of the Commission fears were expressed by the press that the consent of the Parliaments was not necessary to the validity of the Treaty. The *Revue Critique* endeavoured in its last number to show that no surrender of our fisheries could be made without the consent of the Dominion Parliament, and our reasoning has since been confirmed by the decision of the Commissioners.

A refusal by any one of the above mentioned Legislatures to ratify the Treaty renders Articles 18 to 25 null and of no effect. In that case the Fisheries will be thrown back to their present unsettled condition, but the other provisions of the Treaty relating to the Alabama Claims, St. Lawrence Navigation and San Juan Questions, which require only to be ratified by the Queen and by the President upon the advice of the Senate, will come into full force and will have full effect from the day that the ratifications are exchanged.†

* Practical Treatise on the Revenue Laws, 1858, p. 309, p. 362.

† The ratification was voted by the Senate on the 24th of May, 1871.

Apprehensions have been expressed that such will not be the only result of the rejection of the Treaty as far as it relates to the Fisheries. It has been asserted that the Treaty of Washington, being a compact, could not be accepted in part. These apprehensions are unfounded.

1st. The Treaty is not a compact or contract, but a compound of several contracts distinct in their nature and objects.

2nd. The stipulation regarding Canada are not of a permanent nature, while the others are.

3rd. Article 33 provides expressly that the stipulations concerning Canada will not take effect unless ratified by its Parliament, meaning thereby that the rest of the Treaty will take effect without this ratification.

4th. Article 43 declares positively that the *Private Treaty*, that is that portion of the Treaty which is in the power of the British Crown and the President and Senate of the United States, such as the Alabama Claims and Boundary Line sections, will come into force from the date of the exchange of ratifications.*

5th. Articles 1, 3, 12 and 36 show that the San Juan Question and other matters foreign to Canada may be finally settled before the Canadian Parliament meets.

The question finally arises, whether the notice required by Article 33 in order to terminate the Treaty can be given at the expiration of the ten years, or at any time subsequently, by the Dominion Government. An answer in the negative is inevitable, for Canada being a dependency of Great Britain and not being one of the contracting parties within the meaning of the Article and of international law, cannot exercise any external act of sovereignty so long as she continue in that state.

We wish to add a remark respecting the principle which has served as a basis for the settlement of the Fishery Question. It is a maxim recognized and consecrated by the uniform usage of nations that commercial advantages should never be granted by one State to another for a pecuniary consideration; that they should be granted only in consideration of a trade equivalent, and in this respect the surrender of the Fisheries is unprecedented and anti-national. To-day we have granted a privilege, to-morrow the ownership may be demanded of us. Armed with the

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* Exchange of ratifications was made in London on the 17th June.

doctrine that territorial rights can be acquired for money, where will our neighbours stop? We beseech our statesmen to reflect upon the consequences before they concede the principle which has already bartered away one of our chief national resources.

The importance of our Fisheries is so considerable that it has at all times attracted the attention of our own statesmen and of foreign nations. Admiral Saunders, a member of the British House of Commons, expressed himself as follows, at a period as far back as the year 1774 (while the Quebec Act of that year was under discussion): "If you give up this (the fishery,) I am afraid you will loose your breed of seamen, and I know no way that this country has of breeding seamen but two; one the fishery, and the other the coasting trade. All other trade is at the expense of men, and whatever hurts your fishery must reduce the naval force of this Country. Sir, the fishery is worth more to you than all the possessions you have put together. Without that fishery your possessions are not safe; nor are you safe in your own country. Instead of doing anything to hurt your fishery, new methods should be taken to rear more seamen. God knows how much you'll find the want of seamen whenever this country finds it necessary to equip its fleets!"*

The Admiral's foresight has been amply justified by the events. It is undoubtedly to her Fisheries that Canada owes the vast progress which she has made in maritime commerce and which has made her merchant fleet the fourth in the world.

From an industrial point of view the material value of the coast and inshore fisheries can scarcely be over-estimated. The Honourable Minister of Marine and Fisheries, on his mission to the Imperial Government in 1870, said to Lord Kimberley: "We possess the whole herring and mackerel fisheries on the Western side of the Atlantic, the Americans having no inshore fisheries of any great value."† The Honourable gentleman says further in his annual report for 1870, that "the aggregate value of the fish products of the Provincial Fisheries is nearly $17,000,000, and is susceptible of being increased to a very much greater value."‡ In another place he says that "the annual increase of yield and

* Debates on the Canada Bill in 1774, by Sir H. Cavendish, p. 197.

† Correspondence between Government of Dominion, and the Imperial Government, on the subject of the fishery, p. 42.

‡ Annual Report of the Department of Marine and Fisheries, Ottawa, 1871, p. 70.

enhanced value of the produce from our Fisheries show how rapid and extensive has been their development. Without reckoning at all the catch by foreigners, the annual value for exportation of the produce of our waters in the Confederated Provinces now exceeds $7,000,000, nearly doubling in ten years."* Elsewhere he observes: "There is no country in the world possessing finer Fisheries than British North America. As a national possession they are inestimable, and as a field for industry and enterprise they are inexhaustible." †

It is asserted by the American Commissioners that *the value of the inshore fisheries is over-estimated; that the United States desires to secure their enjoyment, not for their commercial or intrinsic value, but for the purpose of removing a source of irritation.* (See Protocol 36 and also Art. 22 of the Treaty.) Nothing is more contrary to good faith than such a statement. Here is what our neighbours thought of the Fisheries at a time when they were far from being so flourishing as they are to-day. In 1814 the Treaty of Ghent was negotiated between Great Britain and the United States,—MM. Adams, Bayard, Clay, Russell and Gallatin acting on behalf of the United States. By this Treaty the privilege of fishing on the Provincial coasts granted to American citizens by the Treaty of 1783, was not continued to them, Mr. Russell being decidedly of opinion that it was worthless. In 1822 this opinion was strongly disapproved in the press and in the House of Representatives of the United States; and Mr. Adams (one of the Commissioners, and afterwards President of the United States) undertook to show, on behalf of the majority of his colleagues, that it was unfounded. The following are extracts from his able plea:

"Of all the errors in Mr. Russell's letter of 11th February, 1815, to the Secretary of State, there is none more extraordinary in its character, or more pernicious in its tendency, than the disparaging estimate which he holds forth of the *value* of the liberties in the fisheries, secured by the Treaty of 1783, and, as he would maintain, extinguished, by the war of 1812. Not satisfied with maintaining in the face of his own signatures at Ghent, the doctrine that all right to them had been irredeemably extinguished by the war; not contented with the devotion of all his learning and all his ingenuity, to take from his country the last and only support of right upon which this great interest had,

* Anuual Report of the Department of Marine and Fisheries. (Ottawa, 1871, p. 62.)

† Ibid, p. 69.

by himself and his colleagues, been left at the conclusion of the peace to depend; not ashamed of urging the total abandonment of a claim, at that very time in litigation, and of which he was himself one of the official defenders, he has exhausted his powers, active and meditative, in the effort to depreciate the *value* of those possessions, which while committed to his charge, he was so surprisingly intent upon relinquishing forever."

"I have shown that the proposal actually made to the British plenipotentiaries was, by the admission of Mr. Russell himself, so worthless, that it was nothing that they could accept; as in fact it was not accepted by them. Let us now see what was the value of this fishery; this "doubtful accommodation of a few fishermen, annually decreasing in number."

"From the tables in Dr. Seybert's Statistical Annals, it will be seen that in the year 1807, there were upwards of seventy thousand tons of shipping employed in the *cod* fishery alone; and that in that and the four preceding years, the exports from the United States of the proceeds of the fisheries, averaged three millions of dollars a year. There was indeed a great diminution during the years subsequent to 1807, till the close of the war—certainly not voluntary, but occasioned by the state of our maritime relations with Europe, by our own restrictive system, and finally by the war. But no sooner was that terminated, than the fisheries revived, and in the year 1816, the year after Mr. Russell's letter was written, there were again upwards of sixty-eight thousand tons employed in the cod fishery alone. From Dr. Seybert's statements, it appears further, that in this occupation the average of seamen employed is of about one man to every seven tons of shipping, so that these vessels were navigated by ten thousand of the hardiest, most skilful, soberest, and best mariners in the world.

"Every person (says Dr. Seybert) on board our fishing vessels, has an interest in common with his associates; their reward depends upon their industry and enterprise. Much caution is observed in the selection of the crews of our fishing vessels; it often happens that every individual is connected by blood and the strongest ties of friendship. Our fishermen are remarkable for their sobriety and good conduct, and they rank with the most skilful navigators."

"Of these ten thousand men, and of their wives and children, the cod fisheries, if I may be allowed the expression, were the daily bread —their property—their subsistence. To how many thousands more were the labours and the dangers of their lives subservient? Their game was not only food and raiment to themselves, but to millions of other human beings.

"There is something in the very occupation of fishermen, not only beneficent in itself but noble and exalted in the qualities of which it requires the habitual exercise. In common with the cultivators of the soil, their labours contribute to the subsistence of mankind, and they have the merit of continual exposure to danger, superadded to

that of unceasing toil. Industry, frugality, patience, perseverance, fortitude, intrepidity, souls inured to perpetual conflict with the elements, and bodies steeled with unremitting action, ever grappling with danger, and familiar with death: these are the properties to which the fisherman of the ocean is formed by the daily labours of his life. These are the properties for which he who knew what was in man, the Saviour of mankind, sought his first, and found his most faithful, ardent, and undaunted disciples among the fishermen of his country. In the deadliest rancours of national wars, the examples of latter ages have been frequent of exempting, by the common consent of the most exasperated enemies, fishermen from the operation of hostilities. In our treaties with Prussia, they are expressly included among the classes of men "*whose occupations are for the common subsistence and benefit of mankind*," with a stipulution, that in the event of war between the parties, they shall be allowed to continue their employment without molestation. Nor is their devotion to their country less conspicuous than their usefulness to their kind. While the huntsman of the ocean, far from his native land, from his family, and his fire-side, pursues at the constant hazard of life, his game upon the bosom of the deep, the desire of his heart, is by the nature of his situation every intently turned towards his home, his children, and his country. To be lost to them gives their keenest edge to his fears, to return with the fruits of his labours to them is the object of all his hopes. By no men upon earth have these qualities and dispositions been more constantly exemplified than by the fishermen of New England. From the proceeds of their "perilous and hardy industry," the value of three millions of dollars a year, for five years preceding 1808, was added to the exports of the United States. This was so much of national wealth *created* by the fishery. With what branch of the whole body of our commerce was this interest unconnected? Into what artery or vein of our political body did it not circulate wholesome blood? To what sinew of our national arm did it not impart firmness and energy? We are told they were "*annually decreasing in number*." Yes! they had lost their occupation by the war; and where were they during the war? They were upon the ocean and upon the lakes, fighting the battles of their country. Turn back to the records of your revolution—ask Samuel Tucker, himself one of the number; a living example of the character common to them all, what were the fishermen of New England, in the tug of war for Independence? Appeal to the heroes of *all* our naval wars—ask the vanquishers of Algiers and Tripoli—ask the redeemers of your citizens from the chains of servitude, and of your nation from the humiliation of annual tribute to the barbarians of Africa—call on the champions of our last struggles with Britain—ask Hull, and Bainbridge, ask Stewart, Porter, and Macdonough, what proportion of New England fishermen were the companions of their victories, and sealed the proudest of our triumphs with their blood; and *then* listen if you can

to be told that the *unoffending* citizens of the West were *not at all* benefitted by the fishing privilege, and that the few fishermen in a remote quarter were *entirely exempt from the danger.*

"But we are told also that "by far the greatest part of the fish taken by our fishermen before the present war, was caught in the open sea, or upon our own coasts, and cured on our own shores." This assertion is, like the rest, erroneous.

"The shore fishery is carried on in vessels of less than twenty tons burthen, the proportion of which, as appears by Seybert's Statistical Annals, is about one seventh of the whole. With regard to the comparative value of the Bank and Labrador fisheries, I subjoin hereto information collected from several persons, acquainted with them, as their statements themselves will show in their minutest details.—Adams on the Fisheries, pp. 202, 204–206.

Mr. Adams concludes by invoking the testimony of many American merchants of high standing and experience, and of many American and foreign journals.

And all these national, commercial and industrial advantages are to be exposed to the selfish and perhaps ruinous action of a host of foreign fishermen (for although apparently inexhaustible they need to be cultivated and carefully preserved); nay they are even to be bartered away to the citizens of a foreign country wholly on in part for a sum of money! And again, what will be the amount of the price paid? Will the arbitrators chosen to estimate the value of the concessions which we are to make, take into consideration merely the time during which these concessions are absolutely made, namely ten years? In case England never gives the required notice and the liberty of fishing is continued for an indefinite period, the United States will enjoy a lucrative privilege in exchange for a trifling equivalent. This fact shows that commercial advantages which, for reasons of public policy and self protection, cannot be granted in perpetuity, cannot be based upon pecuniary considerations, but solely upon mutual trade arrangements. If the arbitrators could, instead of a block sum, set down as compensation a certain annual instalment, payable so long as the part of the Treaty relating to the Fisheries shall remain in force, the injustice would be less glaring. But the Treaty, in declaring by Article 22 that the indemnity shall be paid within twelve months in a gross sum, has taken away from the Commissioners all choice in the matter.

But, says our neighbours, as regards reciprocity we give you in exchange more than we receive. We give you the liberty to

fish on our coasts north of the 39th parallel of north latitude, a concession which is nearly as valuable as yours; and secondly, we open our vast market to the products of your Fisheries.

As to the first of these privileges, it would appear from the Report of the Minister of Marine and Fisheries that "the United States inshore fisheries are too distant and too much deteriorated to be of the slightest value to us."* It is certain that our fishermen have never interfered with them. And if they are as valuable as is pretended, why has the President complained so loudly of the exclusion of American fishermen from our coast fisheries? And granting them to be ever so valuable, of what use are they to us, seeing that the American market is closed to all fish caught there by our fishermen, and seeing further that we have in our own waters all the fish we need? The privilege to fish in United States waters is therefore illusory and exists only on the parchment on which it is written.

As to the second privilege—the right of selling in the United States market, free of duty, fish, the produce of our own fishing grounds—its value is very problematical. 1st. The Canadian fishermen are too remote from the American fishing grounds to be able to compete successfully with the American fishermen in their operations there, and if they should succeed so far, they will be met in the American ports by a duty from which their American rivals will be free. Even with regard to the produce of the Canadian inshore waters, our fishermen will be subjected to great annoyance and numberless inquiries into the proof of the fact that their fish is really the produce of the inshore waters, and not of the open sea or American waters; so that in many instances the claim of exemption may lead to seizure and confiscation and become the fruitful source of strife and mutual recrimination.

Will not the Canadian fishermen be crowded out by the American fishermen? Such a result is greatly to be feared; and in that event it will be found that we have made not only a gratuitous concession but also one positively disastrous to our fishermen.

The Minister of Marine in his report, dated 30th June, 1869, when the system of licenses to foreign fishermen was in operation, said: "The continued admission of foreign fishing vessels and fishermen to participate in our valuable coast Fisheries on paying a nominal license fee as authorised by the Act of last session of

* Marine Report, 1871, p. 75.

Parliament, has not operated satisfactorily; the payment of the fee being, in most cases, altogether evaded. American vessels have boldly entered into our bays, creeks and harbours, and have actually crowded out the native fishermen without any regard to Treaty obligations. The crews of these vessels have in several instances created serious disturbances and committed outrages against the persons and property of fishermen and settlers." These are grave accusations. If American fishermen have shown themselves in such force and acted with such audacity under a system of toleration, what may they not do under a system of perfect liberty and equality of rights?

Another fact deserving of notice is that in 1869, under the license system "the Americans employ tonnage varying between eight and eleven hundred vessels in these (Provincial) Fisheries. Their estimated annual catch, chiefly within the three mile limit, is valued at about $8,000,000," * against $7,000,000 being the value of the exportations of British fishermen during the same time.

It is to be regretted that no statistics of the quantity of fish caught in the Provincial waters and exported to the United States during the period of the Reciprocity Treaty, have been kept by any of the Governments interested. Such statistics would throw much light upon the matter.

However, it is certain that the Reciprocity Treaty of 1854 admitted free into the United States nearly forty different products of the British Colonies, including fish of all kinds, poultry, eggs, butter, furs, timber and lumber of all kinds, &c., in consideration of the cession of our Fisheries, though less valuable in 1854 than they are to-day; and it is well known that our neighbours are not in the habit of giving more than they receive.

IV.—THE ST. LAWRENCE NAVIGATION AND THE TRANSIT AND COASTING TRADE.

For many years the United States have laid claim to the right of freely navigating the St. Lawrence river and canals. Canada, although denying the right, has always allowed them to exercise it, *pro tempore*, while the American rivers and canals have been, and still are, closed to Canadian vessels.

The 36th protocol contains nothing worthy of note upon this

* Annual Report of Minister of Marine (Ottawa, 1871). p. 70.

matter, and we, therefore, pass at once to the articles of the Treaty.

ART. 26. The navigation of the River St. Lawrence, ascending and descending from the 45th parallel of north latitude, where it ceases to form the boundary between the two countries, from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain or of the Dominion of Canada not inconsistent with such privilege of free navigation. The navigation of the rivers Yucon, Porcupine, and Stikine, ascending and descending from, to, and into the sea, shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of either country within its own territory not inconsistent with such privilege of free navigation.

ART. 27. The Government of Her Britannic Majesty engage to urge upon the Government of the Dominion of Canada to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other Canals in the Dominion, on terms of equality with the inhabitants of the Dominion, and the Government of the United States engages that the subjects of Her Britannic Majesty shall enjoy the use of the St. Clair Flats Canal on terms of equality with the inhabitants of the United States, and further engages to urge upon the State Governments to secure to the subjects of Her Britannic Majesty the use of the several State Canals connected with the navigation of the lakes or rivers traversed by or contiguous to the boundary line between the possessions of the high contracting parties on terms of equality with the inhabitants of the United States.

ART. 28. The navigation of Lake Michigan shall also, for the term of years mentioned in Article 33 of this treaty, be free and open for the purposes of commerce to the subjects of Her Britannic Majesty, subject to any laws and regulations of the United States, or of the States bordering thereon, not inconsistent with such privilege of free navigation.

ART. 29. It is agreed that for the term of years mentioned in Article 33 of this Treaty, goods, wares, or merchandise arriving at the ports of New York, Boston and Portland, and any other ports of the United States, which have been, or may from time to time, be specially designated by the President of the United States, and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper Custom-House and conveyed in transit without the payment of duties through the territory of the United States, under such rules, regulations, and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe, and under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit without the payment of duties from said possessions through the territory of the United States for export from the said ports of the United States. It

is further agreed that for the like period goods, wares, or merchandise, arriving at any of the ports of Her Britannic Majesty's Possessions in North America, and destined for the United States may be entered at the proper Custom-House and conveyed in transit without the payment of duties through the said possessions, under such rules and regulations and conditions for the protection of the revenue as the Government of the said possessions may from time to time prescribe, and under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit without payment of duties from the United States through said possessions to other places in the United States, or for export from ports in the said possessions.

ART. 30. It is agreed that for the term of years mentioned in Article 33 of this Treaty, subjects of H. B. M. may carry in British vessels, without payment of duties, goods, wares or merchandise, from one port or place within the territory of the United States, upon the St. Lawrence, the Great Lakes, and the rivers connecting the same, to another port or place within the territory of the United States as aforesaid; provided that a portion of such transportation is made through the Dominion of Canada by land carriage or in bond under such rules and regulations as may be agreed upon between the Government of Her Britannic Majesty and the Government of the United States. Citizens of the United States may for the like period carry in United States vessels without payment of duty, goods, wares, or merchandise, from one port or place within the possessions of Her Britannic Majesty in North America to another port or place within the said possessions. *Provided*, that a portion of such transportation is made through the territory of the United States by land carriage, and in bond, under such rules and regulations as may be agreed upon between the Government of the United States and the Government of her Britannic Majesty. The Government of the United States further engages not to impose any export duties on goods, wares, or merchandise carried under this article through the Territory of the United States, and Her Britannic Majesty's Government engage to urge the Parliament of the Dominion of Canada, and the Legislatures of the other Colonies, not to impose any export duties on goods, wares, or merchandise carried under this Article. And the Government of the United States may, in case such export duties are imposed by the Dominion of Canada, suspend, during the period that such duties are imposed, the right of carrying granted under this article in favour of the subjects of Her Britannic Majesty. The Government of the United States may also suspend the right of carrying granted in favour of the subjects of Her Britannic Majesty, under this Article, in case the Dominion of Canada should at any time deprive the citizens of the United States of the use of the canals in said Dominion on terms of equality with the inhabitants of the Dominion, as provided in article 27.

ART. 31. The Government of Her Britannic Majesty further engage to urge upon the Parliament of the Dominion of Canada and the Legislature of New Brunswick that no export or other duty* shall be levied on lumber or timber of any kind cut on that portion of the American territory in the State of Maine watered by the River St. John and its tributaries,† and floated down that river to the sea, when the same is shipped to the United States from the Province of New Brunswick, and in case any such export or other duty continues to be levied after the expiration of one year from the date of the exchange of the ratifications of this Treaty, it is agreed that the Government of the United States may suspend the right of carrying hereinbefore granted under article No. 30 of this Treaty for such period as such export or other duty may be levied.

A point of international law which has never been clearly decided is, whether a river navigable through its course, is free to the inhabitants of all the countries through which it runs. This important question was fully discussed in the last number of the *Revue Critique*, to which we refer the reader. But it never occurred to any one that rivers made navigable only with the aid of artificial canals, were free by the mere force of international law. In such a case the right of a bordering nation is indeed only an imperfect one, to be conceded by the State in possession for the consideration of reciprocal commercial advantages alone; and it is this absence of reciprocity which strikes us in the part of the Treaty having reference to the navigation of the St. Lawrence.

The St. Lawrence being navigable upwards and downwards for seven months in the year from Montreal to the sea, requires a large public expenditure for light houses and also for the deepening and clearing of the channel at the head of Lake St. Peter. The privilege of freely navigating this river from the boundary line, on the 45th parallel near St. Regis, is granted to our neighbours for ever, in exchange for the liberty given to us to navigate the Stikine, Yucon and Porcupine,—the two latter streams rising in the rugged wilds of the Far North run into the Arctic Seas near Behring's Strait after traversing the Russian Territory, now the property of the United States. During three-fourths of the year, these rivers, which flow through a country that is not and

* This export duty amounts to $43,000 on American lumber alone.

† This river was declared free to American and British subjects under the Ashburton Treaty, 1842.

probably never can be settled by civilized men* are frozen nearly to the bottom. And this is the equivalent offered to us for the freedom of the St. Lawrence. The bargain is ineffably ridiculous, and would be laughable if it were not irrevocable.

It is to be hoped that the protest made by the Canadian Government against the Treaty not only comprehends that part of it which concerns the Fisheries, but also that which relates to the ratification by the Crown only, of the St. Lawrence navigation, Canada exercises the sovereignty of the river from the 45th parallel to the sea, and she cannot be deprived of it otherwise than by an Act of her own Legislature or at all events of the Imperial Parliament. The Queen, although possessing as a general rule the right of ratifying Treaties, does not possess the power of ceding any part of the Empire in the time of peace, without the consent of Parliament, as Forsyth has shown beyond any doubt, in his late work on Constitutional Law, pp. 182–187.† This want of power in the British Crown is incontestable, and has been formally recognized by the Joint High Commission and recorded in the Treaty itself in connection with the Fishery and Canal Questions.

It cannot be replied that Article 26 contains no cession, and that it is merely a recognition of the principle of international law, that all rivers situated like the St. Lawrence are free, For, firstly, the Article itself declares that it grants a privilege, not that it proclaims a right. Secondly, the fact that there are other rivers in the British possessions in the same position with the Stikine, Yucon and Porcupine, establishes beyond contradiction that the Treaty is not declaratory of a principle of international law.

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* See Report of Survey by Capt. Raymond, U. S. A., 1869, printed as Executive Document No. 12, Senate, XLIInd Congress. Captain Raymond sums up the capacity of the Yucon region for the fur trade by saying (p. 39) that the amount "will at most furnish a business for one Company and employment on the river for fifteen men." The timber "cannot for many years become an article of commerce, because large supplies, superior in quality, and much more accessible exist" nearer the market. Much the same may be said of the fish, in which it abounds; as for agricultural resources, they do not exist, and "no valuable mineral deposits in workable quantities have been found in the vicinity of the Yucon River up to the present time.—*The Nation*, 29 June, 1871.

† *Revue Critique*. See also Puffendof, Le Droit de la Nature, vol. 2, p. 451, 453; Grotius, lib. 2, c. 6.

It is, indeed, very singular that the Columbia River, which rises in British Columbia, and flows to the sea through the State of Oregon and the Washington territory, has not been declared free to the inhabitants of both countries. By the Treaty of the 15th June, 1846, commonly known as the Oregon Treaty, between Great Britain and the United States, that river was declared free and open to the Hudson's Bay Company and to all British subjects trading with the same (Art. 2); but it has never, and justly so, been understood to apply to all British subjects. In the opinion of Mr. Webster, "the reservation of the rights in the Oregon Treaty to navigate the Columbia River enures to the benefit of the Hudson's Bay Company alone. The object was not a general grant of privilege to English commerce or English subjects generally." * Such is likewise the general opinion of Canadian jurists. "This language," observed Mr. Justice Day, counsel for the Hudson's Bay Company, before the Commission named to settle the claims of that Company, speaking of the free navigation of the Columbia, "imports that the right reserved was for the benefit of the Company alone; it is not extended to any class of persons other than those whose business is solely with and for this body." † It is therefore extremely surprising that a river so important to Canadians, more especially when British Columbia is admitted into the Dominion, has not been declared free to them at the same time as the St. Lawrence to American citizens.

Mr. McKinlay says: "The importance of the navigation of the Columbia river to the business of the Company and as a means of communication was very great; it was almost an absolute necessity to them, as without it they would be compelled to transport their goods by horses, which would have destroyed all the profits of their trade. Without the river, in my opinion, they would not have come into the country at all to commence their business, nor have carried it on with any hope of success The river being useless for navigation without the free use of the portages, the importance of their being always free and open must be apparent." ‡

The only condition on which the free navigation of the St. Lawrence and all the rivers and canals of the Dominion could be

* Memorial and argument on the part of the Hudson's Bay Company, Montreal (1868), p. 183.

† Ibid. ‡ Ibid. p. 184.

justly granted to our neighbours is that they should follow the example of European nations and give us in return the free navigation of all their rivers and canals connecting with Canadian waters, in addition to an extra toll or commercial advantage as indemnity for the greater cost of our public works and their higher value to Americans in comparison with the value of American public works to Canadians. A treaty to this effect, although more favourable to the United States than to Canada, since the navigation of the St. Lawrence and its canals is the indispensable outlet of 17 millions of people in the Western States, would at all events possess the merit of being based upon equity and of approximating to the maxim of natural law that commerce is free.

It remains for us to observe that to proclaim the free navigation of the St. Lawrence, the navigation whereof is impossible on account of its insurmountable falls and rapids, is to declare an impossibility. But, it may be said, the right of navigating the St. Lawrence in ascending and descending being conceded, we must conclude that it comprehends the right of using the Lachine and Beauharnois Canals, without which navigation upwards is impossible. To this we answer: 1st. That the right designated by Article 26, is a natural right, and can comprise only what exists naturally. 2nd. That Article 27 of the Treaty declares that the grant of the use of the Dominion Canals can only be made by the Dominion Government. 3rd. And lastly, the grant by the Crown only of the use of our Canals being equivalent to a cession of territory, is contrary to English constitutional law.

Thus, by Article 26, American citizens have the privilege of going down the river, but not that of going up from Montreal to the 45th parallel.

Will the Canadian Government come to their rescue in this difficulty, and secure for ever to them the use of all the Canals in the Dominion for the sole consideration of the use by British subjects of the St. Clair Flats Canal and the several State Canals connected with the navigation of the lakes or rivers traversed by or contiguous to the boundary line, as provided by Article 27? The inequality of the bargain is so enormous, (Canada really needing only the Sault Ste. Marie Canal, one mile in length,) that there cannot be any doubt the Canadian Government (who, in a matter of this kind, can act only with the advice of the Dominion Parliament), will refuse to give, as a permanent right,

the privilege demanded, except on payment of extra toll and the perpetual grant of at least the transit trade by land and water, as indemnity for the construction of these Canals, which are 220 miles in length, and have cost nearly $20,000,000. Such an indemnity is far from being exorbitant, and is authorized by precedents. Thus, the navigation of the Danube is at the common expense of the several States enjoying the same. Woolsey, an *American* authority on international law, says: "When a river affords to an inland State *the only*, or *the only convenient* means of access to the ocean and to the rest of mankind, its right becomes so strong, that according to natural justice, possession of the territory ought to be regarded as a far inferior ground of right. Is such a nation to be crippled in its resources and shut out from mankind, or should it depend on another's caprice for a great part of what makes nations fulfil their vocation in the world, merely because it lies remote from the sea, which is free to all? Transit, then, when necessary, may be demanded as a right; an interior nation has a servitude along nature's highway, through the property of its neighbour, to reach the great highway of nations. It must, indeed, give all due security that trespasses shall not be committed on the passage, *and pay for all equitable charges for improvement* and the like; but this done, its travellers should be free to come and go on that water road, which is intended for them." Need we point out that if we cannot close our rivers and canals when offered *payment for equitable charges*, our neighbours cannot refuse us the winter transit trade, for which we have always paid the railway freight, the equitable charge whereof Woolsey speaks*: On the other hand, payment of tolls on a footing of equality with the inhabitants of Canada by American vessels passing through our rivers and canals and receiving freight, is every thing but an equivalent for the use of our territory.

In any case, the use of our Canals should be granted only for the time during which the coasting and transit trade and other concessions contained in Articles 27, 28, 29 and 30 shall continue to exist, namely ten years. If the navigation of our Canals be

* The report of Mr. Larned [1871] states that the goods shipped through the United States *in transitu* to Canada were of the value of $16,519,637. The freight on such a volume of trade must amount to a very large sum.

declared free to our neighbours forever, as provided for by the Treaty, we shall, in ten years, be at their mercy for our winter imports from Europe.* It is therefore of the highest importance to keep well in hand the only available means that can enable us to secure the continuation of these commercial advantages.

V.—THE SAN JUAN QUESTION.

It is a principle derived from the Roman law and universally admitted into the municipal laws of civilized nations and also by writers on international law, that when two neighbouring citizens or States disagree concerning their common boundary, the dispute must be settled by their titles, and that in case of doubt, the benefit of the doubt shall be given to the party first in possession. This principle, although grounded in reason and justice, has been repeatedly violated by the American Government in its relations with its neighbours in general and with Canada in particular. The dispute respecting the Northern Boundary goes back to the foundation of the Republic, and notwithstanding that several treaties have been entered into and surveys made under their provisions for the purpose of determining the Boundary, we seem to be still far removed from a definite settlement.

In the second article of the Treaty of Peace of 1783, the Northern Boundary of the United States is fully described as running along certain "Highlands" dividing rivers flowing into the St. Lawrence from rivers flowing into the Atlantic Ocean, and thence by a specific line westward to the river Mississippi.

As early as the year 1792, the United States began to claim the highlands to the north of the St. John River as being the "Highlands" referred to in the Treaty, the British Government contending, on the other hand, for the highlands to the south of that river. After a great deal of diplomatic correspondence and agreements, the Ashburton Treaty of 1842 was concluded, whereby Great Britain ceded 3,337,000 square acres of the disputed territory to the United States.†

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* The Inter-colonial Railway, which will be completed within two years, may prove to be passable in winter. In that case the transit trade through the United States will not only not be needed, but will be positively injurious to that national railway enterprise.

† Observations on the Treaty of Washington (1843) by G. W. Featherstonhaugh.

At the time when the Treaty was ratified, the British Government, although being aware of the existence of an original map showing the position of the Boundary line, were unable to discover the same.

During the negociations, the American Secretary of State, Mr. Webster, who concluded this treaty with Lord Ashburton, solemnly reiterated his own belief and that of the branches of the American Government in the justice of their claim. In one of his letters, he said: "I must be permitted to say that few questions have ever arisen under this Government in regard to which *a stronger conviction was felt that the country was in the right*, than this question of the North-Eastern Boundary." *

But, a short time after the ratification of the Treaty by the United States Senate (in secret session), the Washington *Globe* published to the world the fact that the Senate had been for some time previous in possession of such a map, discovered by one Mr. Sparks, as reported by himself in a communication to the American department of State:

"While pursuing my researches among the voluminous papers relating to the American Revolution in the *Archives des Affaires Etrangères* in Paris, I found" said Mr. Sparks, "in one of the bound volumes an original letter from Dr. Franklin to Count de Vergennes, of which the following is an exact transcript:

"PASSY, *December* 6, 1782.

"SIR,—I have the honour of returning herewith the map your Excellency sent me yesterday. I have marked with a *strong red line*, according to your desire, the limits of the United States, as settled in the preliminaries between the British and American plenipotentiaries.

"With great respect, I am, &c.,

B. FRANKLIN."

"This letter was written six days after the preliminaries were signed; and if we could procure the identical map mentioned by Franklin, it would seem to afford *conclusive evidence* as to the meaning affixed by the Commissioners to the language of the Treaty on the subject of the Boundaries. You may well suppose that I lost no time in making inquiry for the map, not doubting that it would confirm all my previous opinions respecting the validity of our claim. In the geographical department of the Archives are sixty thousand maps and charts; but so well arranged with catalogues and indexes that any one of them may be easily

* Civilized America, by Grattan, p. 377.

found. After a little research in the American division, with the aid of the keeper, I came upon a map of North America by D'Auville, dated 1746, in size about eighteen inches square, on which was drawn a *strong red line* throughout the entire boundary of the United States, answering precisely to Franklin's description. The line is bold and distinct in every part, made with red ink, and apparently drawn with a hair pencil, or a pen with a blunt point.

"*Imagine my surprise on discovering that this line runs wholly south of the St. John's* and between the head waters of that river and those of the Penobscot and Kennebec. In short, *it is exactly the line contended for by Great Britain*, except that it concedes *more* than is claimed." *

Comment on the conduct of the United States in this matter is superfluous. "There being no room to doubt the authenticity of the map," said Mr. Featherstonhaugh, p. 102,† "we are unavoidably brought to a conviction that whilst the highest functionaries of the American Government were dealing with Lord Ashburton with a seeming integrity, they were in fact deceiving him; and that whilst they were pledging the faith of their Government for a perfect conviction of the justice of their claim to the territory which was in dispute, they had the highest evidence in their possession which the nature of the case admitted of, that the United States never had had the slightest shadow of right to any part of the territory which they had been disputing with Great Britain for nearly fifty years."

The North-Eastern Boundary being thus disposed of, our neighbours fastened their eyes upon the North-West. Great Britain was then in legal possession of the Oregon Territory, comprising the whole basin of the Columbia, as has been proved in the clearest manner by Mr. Meredith in a vigorous pamphlet published at Montreal in 1846.‡ Yet for the sake of peace, the

* The Ashburton Treaty by Featherstonhaugh, p. 104; Grattan, Civilized America, p. 387.

The Franklin map was brought to the notice of the Senate by Senator Rives, to induce that body to take the conceded territory of Maine, rather than expose the country to the total loss of the whole ground claimed by the United States, to wit, about 7,000,000 acres of land.

† Before the publication of the Franklin map, Mr. Featherstonhaugh was one of the most devoted defenders of the Ashburton Treaty in England.

‡ See also Travers Twiss on the Oregon Treaty, New York, 1846.

Territory of Oregon was for the most part abandoned to the United States by the Treaty of 1846.

The interpretation of this Treaty has given rise to a new claim on the part of our neighbours. The gist of the question lies in the first article, which establishes the line. These are the words:—

"From the point on the 49th parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary between the territories of the United States and those of Her Britannic Majesty shall be continued westward along the said 49th parallel of north latitude *to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of the said channel and of Fuca's Straits to the Pacific Ocean;* provided, however, that the navigation of the whole of the said channel and Straits South of the 49th parallel of north latitude remain free and open to both parties."

The United States contend that the channel designated by the Treaty, is not that of the Gulf of Georgia and the Vancouver or Rosario Strait (the only channel of navigation in use in 1846), as maintained by Great Britain, but that of the Canal de Haro which runs close to the shores of Vancouver's Island. In our humble opinion the channel of the Treaty is not the channel of navigation either then or now in use, but the channel or main body of water *separating the Continent from Vancouver's Island.* The Canal de Haro being a small strait between Vancouver's Island and San Juan, can only be a fragment of this *Channel.*

If the boundary line be finally run through this channel of Rosario, San Juan and other islands fall to Great Britain, if through the Canal de Haro, they fall to the United States.

A resident of Victoria, V. I., well acquainted with the facts observes:

"To the United States the islands are really useless, except for purposes of annoyance, eyesore and impediment. They are far removed from their territories on the mainland, and their position is intended evidently as a wedge to wrest Vancouver's Island and British Columbia from England.

"To Great Britain the Island of San Juan is of the first importance. It is the key to the Gulf of Georgia. It commands the narrow channels through which alone British Columbia and

the inner coast of Vancouver's Island can be approached. We require it to give us a right of access, ingress and egress to our own possessions, unmolested by another power. Both Vancouver's Island and British Columbia had better be given up if we part with San Juan; for a fortification on this island would command our western passage to Fraser River by the Canal de Haro, while if we are foolish enough to submit to the line being run through the Canal, and the Americans, consequently, get the group, they can also fortify Lopez and other islands, and completely command the eastern passage of Rosario and shut us out entirely from our own mainland. The most strained interpretation of the Treaty will not give them the line they claim; but it is not the true construction or meaning of treaties they want to arrive at. It is possession of our new gold country, of which they are rabidly jealous."*

By the Washington Treaty of 1871, the United States will probably be put in possession of the Island of San Juan, and we may be sure that before many years elapse, we shall be called upon to cede some other piece of territory to which our neighbours may find it agreeable to set up a claim. In fact Captain Raymond, an American exploring officer, has already reported to his Government that there is something wrong about the boundary of Alaska.†

It is astonishing that Great Britain, while consenting to the reconsideration of the Northern Boundary Line, did not insist upon a re-adjustment of the North-Eastern Boundary, as the latter had been obtained by fraud and bad faith. Judge Story, upon learning the existence of the Franklin Map, said that the American Government's conduct was "a most disgraceful proceeding," and "that he was even prepared for the British Government insisting on a reconsideration, if not the annulling, of the Treaty."‡ Senator Benton, one of the strongest supporters

* London *Times*, 27th Sept. 1859; Civilized America, by Grattan, 2nd ed. 1859, note, p. xix.

† The New York *Nation*, 29th June, 1871, while noticing Captain Raymond's Report of his Survey on the West Coast of Alaska, says: "Captain Raymond's chief errand was to ascertain if Fort Yukon lay within the territory of the United States, since the Hudson's Bay Company had possession of it. He found that it clearly did, *and hoisted the flag over it.*"

‡ Grattan, Civ. America, p. 386.

of the American claim, observed that "if the maps were authentic, the concealment of them was a fraud on the British, and that the Senate was insulted by being made a party to the fraud," and that "if evidence had been discovered which deprived Maine of the title to one-third of its territory, honour required that it should be made known to the British." *

The articles of the Treaty of Washington of 1871, relating to San Juan are as follows :

ART. 34. Whereas it was stipulated by Article 1 of the Treaty concluded at Washington on the 15th of June, 1846, between the United States of America and Her Britannic Majesty, that the line of boundary between the territories of the United States and those of Her Britannic Majesty, from the point on the 49th parallel of north latitude up to which it had already been ascertained, should be continued westward along the said parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly along the middle of the said channel and of Fuca Strait to the Pacific Ocean; and, whereas, the Commissioners appointed by the two high contracting parties to determine that portion of the boundary which runs southerly through the middle of the channel aforesaid were unable to agree upon the same; and whereas the Government of Her Britannic Majesty claims that such boundary line should, under the terms of the Treaty above-recited, be run through the Rosario Straits, and the Government of the United States claims that it should be run through the Canal De Haro, it is agreed that the respective claims of the Government of

* Grattan, Civ. America, p. 391.

We cannot fail to observe that in all the treaties between England and the United States, the British Plenipotentiaries have been taken at a disadvantage by those of the United States; the latter, being well acquainted with the places and things concerning which they were treating, have uniformly succeeded in deceiving the British representatives, all more or less ignorant of the interests and resources of the Colonies. Hence the geographical errors and difficulties of interpretation contained in every treaty from that of 1783 to that of 1846; and no one should be surprised if the case is found to be the same in the Treaty of Washington of 1871.

Since the signing of the Treaty an American official map has been discovered, showing that the United States have no right to San Juan Island. This map was published in 1848, and is entitled "Map of Oregon and Upper California, from the Survey of John Charles Fremont and other authorities; drawn by Charles Preuss under the order of the Senate of the United States, Washington City, 1848. Lithographed by Weber & Co., Baltimore." It is asserted that the American Government has called in and destroyed all the copies thereof obtainable.

Her Britannic Majesty and of the Government of the United States shall be submitted to the arbitration and award of His Majesty the Emperor of Germany, who, having regard to the above-mentioned article of the said Treaty, shall decide thereupon finally and without appeal which of these claims is most in accordance with the true interpretation of the Treaty of June 15, 1846.

All the articles from p. 35 to p. 42, inclusive, have reference to procedure only.

VI.—CONCLUDING REMARKS.

Under those circumstances will the portion of the Treaty of Washington relating to the Fisheries and the Canals be ratified by the Provincial Legislatures?

There is no room to doubt that Newfoundland, the greater part of whose coast is open to American fishermen by virtue of the Convention of 1818, and which consequently can only be benefitted by the Treaty (their fish not having been free of duty) will ratify it without delay. But Newfoundland cannot benefit by the Treaty until it has been ratified as provided for by Art. 33.

With respect to Prince Edward's Island, if we may judge by the past policy of its Government, always hostile to that of the Dominion Government, the legislature of that Colony will also undoubtedly give its assent to it. The Executive Council declared on the 2nd September, 1870, as follows: *

"Fairly stated, the old policy revived demands from the people of Prince Edward Island, the exclusion from their harbours of their best customers—customers who have employed the Colonial marine in importing salt for their use, the Colonial mechanics in manufacturing their barrels; customers who have purchased their clothing, their provisions and their sea-stores in the Island markets. These men are to be expelled until the forty millions citizens of the United States succumb to the pressure put upon them by four millions of Colonists, and consent to concede reciprocity in exchange for free access to the fishing grounds and harbours of the Colonies." *

What line of conduct will be followed by the Government of Canada? Let us interrogate the past and perhaps we may draw a conclusion as to the future.

It must be admitted that the policy of the Dominion Government has hitherto been preeminently a national one.

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* Correspondence between the Government of the Dominion and the Imperial Government on the subject of the Fisheries (1871) p. 53.

Lord Granville, in a cable despatch to the Governor-General of Canada, dated the 6th of June, 1870, expressed "the hope that the United States fishermen will not be for the present prevented from fishing except within three miles of land or in bays which are less than six miles broad at the mouth."* Evidently the British Government wished to tolerate, for the time being, the pretensions of the United States in the headland dispute. The following answer was returned by the Government of Canada to this request:

"Reference is particularly requested to Reports of the 15th and 20th of December last, in which the whole matter in question is fully set forth. The conclusions arrived at were,—that, as the American Government had voluntarily terminated the Treaty of 1854, and ever since failed to consider any propositions regarding an equivalent for our own in-shore fisheries, notwithstanding an intermediate license system which continued to United States citizens the same fishery privileges they had enjoyed under the Reciprocity Treaty, on merely formal conditions, all such concessions should be absolutely withdrawn and our rights duly enforced as they existed and were upheld anterior to that reciprocal compact." †

The Minister of Marine in his official report ending 30th June, 1869, said:

"The material worth and national importance to Canada of the coast and inshore fisheries in British American waters can scarcely be over-estimated. Their produce and control are of especial value to Nova Scotia, and that Province might reasonably expect from the union of Colonial interests some accession to the vigor and authority with which our exclusive fishery rights within treaty limits have been already maintained by the authorities of that Province.

"The undersigned need not enlarge upon the vital and vast importance to the Dominion of Canada of a strict maintenance of those principles of maritime jurisdiction and rights of fishery derivable from the Parent State. Immense as is the intrinsic value of the exhaustless Fisheries which form so large a portion of our material resources, their rightful control and exclusive use possess a peculiar value and significance intimately connected with the new condition and prospects of this country. The actual situation and future development of these inshore fisheries acquire, if possible, additional importance from the selection of a sea-board line of railway connecting the hitherto separated Provinces of the British North American Confederation.

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* Correspondence with the Government of the Dominion, &c., p. 31.

† Ibid, p. 30.

"If these Provinces must in future depend more fully on their own resources and open new markets for their natural products, our attention cannot now be too soon turned to the development of our vast and valuable Fisheries. They should form the staple of an extensive and lucrative trade with foreign countries, and with the other British Colonies. They provide an important nursery for our seamen, and they afford an inexhaustible field for the skill and energy of our sea-board population. They possess a great and peculiar value to Canada. Their exclusive use, therefore, affords these united Provinces such advantages as a young country cannot too highly estimate, and should on no account neglect or abandon."

Accordingly eight well equipped vessels were sent to the Gulf and Atlantic coasts in 1870, by the Government of Canada, to protect our Fisheries against the encroachments of foreign fishermen.

Such was the language and the conduct of the Government in 1860 and 1870, and it is needless to add that it has been fully endorsed by the Canadian Parliament. Why should its policy not be to the same effect in 1871 ?

It has been already stated by one of the honourable members of the Cabinet, the Hon. Mr. Langevin, that so soon as the Government of Canada heard that the Commission was about to give up the Fisheries for the small consideration mentioned in the Treaty, they protested energetically. The Honourable Minister added:—"It will be for England to show to Canada what reasons and inducements there are for us, as a people, to ratify that portion of the Treaty relating to the Fisheries; but, in the meantime, Canada remains free to act,—the Government of Canada is untrammelled. I say all the ministers, including the Prime Minister, remain free to act as the interests of Canada may require. Parliament will have the matter laid before it at its next Session, and the representatives of the people will be then in a position to say whether the reasons given by England for the ratification of that portion of the Treaty by us, are such as the true interests of Canada call for." *

It has been asserted that the Government of Canada is bound to defend the Treaty, *coute que coute*, because the First Minister signed it. It is replied that he signed it under protest, and only to further the settlement of the Alabama claims.† We cannot conceal from ourselves, however, that the Honourable Premier's

* Montreal *Gazette*, 15th June, 1867.

† Ibid, 27th June, and also 6th July.

signature to the Treaty is a fact greatly to be regretted. In view of the numerous and palpable acts of injustice, of which Canada was the victim, Sir John A. Macdonald (whose signature was not necessary to the settlement of the Alabama question, since the required majority existed without him) owed it to his country and to the past policy of his Government, not to protest merely, but to resign, as Judge Day did in the matter of the Provincial Arbitration. There is no evidence that he even protested—at least protocol 36, the only official report of the proceedings of the Commission, makes no mention of it. But whether he did so or not, it is unreasonable to conclude that the Government of the Dominion, who, in protesting against the Treaty, have done all that the circumstances demanded, can be held responsible for the *faux pas* of the Premier acting in his capacity of British Commissioner, or should be deprived of their freedom of action in a matter of such importance. It is to be hoped, at all events, that if the Canadian Executive does not make the ratification of the Treaty a Ministerial question, they will leave it as an open question to the Parliament. It is but fair that the country should take the responsibility, as it must accept the consequences, of the rejection of the part of the Treaty which relates to the Fisheries and the Canals.

We may remark that public opinion has pronounced decisively against the Treaty through the press. Scarcely more than two or three journals have entreated in a hesitating way to await its justification by the English Government before Canada decide to reject it. But more: one Provincial Legislature (that of New Brunswick) happened to be sitting at the time when the Treaty was published. On the 17th of May, upon motion by the Attorney-General, the House of Assembly resolved unanimously,—

"1. That the privileges accorded to subjects of Great Britain by the nineteenth and twenty-first articles of the Treaty are by no means an equivalent for the privileges accorded by the eighteenth article to the inhabitants of the United States. That the reciprocal privilege of fishing in certain American waters is barren and delusive, and that the mode of determining and accounting for excess in value of the privilege accorded by the Government of Great Britain over those accorded by the Government of the United States is erroneous in principle and impracticable in execution, and the considerations of advantage are too remote and uncertain.

"2. That in any Treaty relating to the free use of the Fisheries and to the Navigation of Rivers and Canals, Canada should, at the same

time, make provisions for the further regulation of commerce and navigation beyond those secured by the articles of the Treaty as above concluded, in such manner as to render the same reciprocally beneficial and satisfactory.

"3. Further resolved that in the opinion of this House the Parliament of Canada should, under existing circumstances, adhere to and carry out the policy of protection of the fishery rights of the Dominion of Canada recently adopted, and should not give assent to the articles of said Treaty relating to the Fisheries."*

On the 18th of May, Lieutenant-Governor Wilmot, in his speech, expressed himself as follows:—

"The result of the deliberations of the Joint High Commission at Washington, so far as our Dominion and Provincial interests are involved, is calculated to excite alarm and dissatisfaction; but we cannot for a moment suppose that the Dominion Parliament will give its consent to those parts of the Treaty which dispose of our invaluable fishery rights for the veriest mockery of an equivalent, when we should have received therefor at least the free admission to United States markets of our ships, coal and lumber."†

Will this protest, coming from a Province so deeply interested in our Fisheries and so well acquainted with their value, be heeded? At all events, it is a matter of the deepest importance that the Dominion Legislature should approach the question in a spirit absolutely free from party politics, and that its vote should be the deliberate and faithful expression of the public opinion of Canada.

It will be for England, said the Hon. Mr. Langevin in his speech above referred to, to show the reasons why Canada should ratify the Treaty, and for Parliament to say whether they are sufficient. In our humble opinion, England should not interfere in the matter. The mischief she has caused us by mixing up our commercial disputes with the Alabama claims, is already great enough. She must not by orders to the Government of the Dominion make it irreparable; and we sincerely trust to see realized the hope expressed by the Earl of Derby in the House of Lords on the 12th of June, that the Canadians would be left perfectly free to express their own opinion upon that part of the Treaty, unbiassed by any hint that if they refused their ratification, they must not look for any further protection from us. ‡

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* Montreal *Gazette*, 18th May. † Ibid 19th May.
‡ Ibid 27th June, 1st July.

And what sufficient reasons can England show? How can any conscientious mind acquainted with all the facts be persuaded that Canada should be made the scape-goat for the faults of the Empire? We are entreated to yield for the sake of peace. The peace policy, excellent though it be, must have its limits; it must not be allowed to become a policy of weakness. For then the peace which is bought at so high a price is not a benefit, but a calamity. We would say to the defenders of the Treaty on the other side of the Atlantic: In 1783, by the Treaty of Recognition of the United States, you abandoned the State of Illinois, and other vast and valuable territories, which had been ceded to Great Britain by France in 1763, as part of *La Nouvelle France* or Canada.* In 1818 you gratuitously ceded the Fisheries on the unsettled shores of Newfoundland and Labrador, and abandoned your right to a Boundary Line to the Mississippi. In 1842 you gave up the territory of Maine, in spite of the fact, since demonstrated by the clearest evidence, that the American Government well knew they had not the shadow of a right to it. In 1846, by the Oregon Treaty, you abandoned the Columbia river and the Oregon territory.

To-day you surrender the Island of San Juan, the Fisheries, and the Navigation of our Rivers and Canals. And all that for the sake of peace. But do you not see that such a policy will eventually lead you to the total sacrifice of all the British Possessions in America, piece by piece, or at least that you will have so diminished and crippled their natural resources as to force them to break the Colonial tie and throw themselves into the arms of the fortunate Republic. These fears, be it observed, are not vain and chimerical; they are unfortunately too well founded, and the fact that the Treaty is viewed with favour by certain Canadian newspapers well known for their American proclivities, shows that such is its anticipated result.

But is it true that the concessions, which Canada is called upon to make, are necessary for the preservation of the friendly relations between the two great sister powers? Proof of the contrary is to be found in the Treaty itself. If peace or war depends on the surrender of our Fisheries and our Canals, whence comes it

* Even the Quebec Act, 1774, 14 Geo. 3, c. 83, sect. 1, of Consolidated Statutes of Canada, declares that at that time the Province of Quebec extended to the Province of Pennsylvania and the Ohio and the Missisippi Rivers.

that the Parliament of Canada (which can constitutionally exercise no control over the foreign policy of the British Crown) is invested with the decisive vote? It would then be in the Colony's power to drag the Mother Country into a conflict with the United States—the very thing to be avoided! And the United States consent to submit to such a contingency! The supposition is, therefore, not only unfounded but utterly absurd and ridiculous. No: it was not in the Americo-Canadians controversies that the seeds of serious dissensions lay concealed, but in England's unjustifiable delay to settle the Alabama claims. If the British Government instead of standing on its honour and dignity and resorting for aid to every species of subterfuge, had from the first or at any time afterwards even during the deliberations of the Commissioners, frankly admitted that Great Britain was in the wrong and offered to make fair compensation for the depredations of the cruisers, the United States would certainly have consented to give us a trade equivalent for our Canals and Fisheries.

What is, finally, the reason why Canadian interests have been sacrificed by the Treaty? The leading journal of the United Kingdom has had the courage to publish it in the following guarded but significant words: "Little ingenuity" says the London *Times* of the 9th June, "would be required to represent this" (the surrender of the Fisheries) "as a sacrifice of small communities to the convenience of powerful States. There was most certainly no intention on the part of the Commissioners of this Country to make any portion of our Empire a scape-goat for the peace of the whole. But it was never disguised that something the Maritime Provinces hitherto have possessed had been bartered away by the Treaty."

Yet this paper boasts that the Treaty of Washington will be ratified by the Parliament of Canada!!

D. GIROUARD.

Montreal, 12th July, 1871.

WRIT OF PROHIBITION.

A government which has made much advancement in civil jurisprudence, has observed the importance of having a variety of courts, and those of different grades. A portion of those controversies which arise among people, are of such character, that a court presided over by a person of limited legal knowledge, is ample to administer justice and law between the parties. They involve matters of inconsiderable importance in value, and are governed by rules of law plain and well understood. And the convenience of having the trial of them brought to the immediate neighbourhood of the parties, overbalances the evils which result from occasional mistakes of such unlettered and unlearned courts. Some controversies, however, involve matters of greater pecuniary importance, or raise questions of law upon which there is room for doubt, and which demand the consideration of minds learned in legal science, and accustomed to discriminating thought.

Intelligent legislation, therefore, divides judicial powers, giving to courts of inferior grades such judicial authority as is consonant with the capacity of the persons presiding in them, and withholding from them all those matters which demand greater ability; and creating, for the determination of important and difficult questions, courts representing a higher degree of talent and learning. It may well be expected that inferior courts will be as liable to be mistaken as to the extent of their jurisdiction as in other matters; and that higher courts will be better judges of not only their own powers but also of the judicial powers of inferior courts. It is therefore important that courts of higher grades should possess a supervisory power over courts of an inferior grade, and that they should possess the power to control and stop them when they are about to exceed the proper and legal limits of their authority. At common law higher courts were invested with this authority over inferior courts; and the process by which they prevented an inferior court from proceeding further in a matter not within its jurisdiction was denominated a writ of prohibition.

The remedy by this writ is not now as often resorted to as formerly, but still exists, although a distinguished attorney not

long since, while arguing a cause in the Court of Appeals in the State of New York, denominated it an obsolete remedy. Modern treatises and works on practice say little, if anything, upon this branch of the law, and very few cases of prohibition find their way into our reports. If, therefore, we desire to learn much of this remedy, we are under the necessity of going to the earlier reports and treatises, which, unfortunately, are fast disappearing from our libraries.

We do not profess to be proficient in this branch of the law; and write upon it, more with the view of calling the attention of the Bar to it, than of throwing light upon it. For, while we are not under the necessity of resorting to this remedy so often as to many others, it is yet many times a very valuable and effective remedy, and is one we cannot afford to consign to oblivion. It seeks to prevent instead of repairing injuries. It does not undertake to undo what is done, but to stop the doing of that which ought not to be done. It reaches cases and parties, which can be reached in no other way, and by no other process. In its character it is similar to the remedy by injunction. And yet it is applicable to a different class of cases and issues to parties to whom a writ of injunction will not lie.

While constitutional or legislative provisions in the States and Canada recognize the existence of this remedy, these provisions do not undertake to provide when the remedy is proper, nor to direct the mode of practice, but leave it as it existed at common law. As a sample of the legislation on this subject, we will here give the law of Lower Canada, which is as extensive and comprehensive as the constitutional and statute law of many or all of the States.

"Writs of prohibition are addressed to Courts of inferior jurisdiction, whenever they exceed their jurisdiction. They are applied for, obtained, and executed in the same manner as writs of mandamus, and with the same formalities."—Code of Civil Procedure, Art. 1031, Sec. 4.

The thirteenth section of the Judicial Act of the United States provides that: "The Supreme Court shall also have appellate jurisdiction from the Circuit Courts, and Courts of the several States, in cases hereinafter provided for; and shall have power to issue writs of prohibition to the District Courts, when proceeding as Courts of Admiralty and maritime jurisdiction, and writs of mandamus in cases warranted by the principles and usages of

law, to any Courts appointed or persons holding office under authority of the United States."

Without, therefore, a knowledge of what the common law was upon this subject, we can have but a very limited understanding of the remedy by prohibition, as it exists in the States, and in Canada.

A prohibition has been defined a "Writ issuing properly only out of the Court of King's Bench, being the King's prerogative writ; directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof upon a suggestion, that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court."

It was denominated one of the King's prerogative writs, because it was deemed the right or privilege of the Sovereign to take supervision of, and to control his substitutes, and to compel them to do right, and to administer justice according to law. It therefore, formerly issued out of the Court of King's Bench only; as in that Court, the King was understood to preside in person, and aided in the administration of justice. And according to the theory of the common law, the King is the fountain of justice, and when the laws do not afford a remedy, and enable the individual to obtain his right, by the regular forms of judicial proceedings, the prerogative powers of the Sovereign may be brought in aid of the ordinary judicial powers of the Court. It had its origin in the will of the King, and not from legislative enactment. It was not a remedy provided by law, but was unknown to the law, and was given and granted by the Sovereign, because in theory, he was the fountain of justice, and might and should provide the means, by which the subject could obtain his right. But by long continued use, this remedy has outgrown its sovereign independent character, and is now regulated by law.

At first, as has been said, the writ issued out of the Court of King's Bench only; but afterwards the power to issue the writ to inferior courts was extended to the Court of Chancery, the Exchequer Court, and even the Court of Common Pleas. In the States, the power to issue the writ is generally given to certain specified courts, either by their constitutions, or by legislative enactments. In the absence of such provisions, it is apprehended that no court could issue this writ, unless it possessed the general superintending power of the Court of King's Bench, or the

general equitable powers of the English Court of Chancery. And when express authority is given by the constitution or by statute to a court to issue this suit in certain specified cases, it must be presumed that there is no authority to issue it in any other cases; upon the maxim, "*expressio unius est exclusio alterius.*"

In the issuing or withholding of this suit, the court is to be governed by a sound discretion. Not an independent, arbitrary, and irresponsible discretion, but a legal discretion. One that is founded upon and constituted by the principles of equity, and the rules of law.

Nor should the courts, in issuing this writ, be governed by narrow and technical rules, but should regard it as a convenient mode of exercising a wholesome control over inferior tribunals; for it is far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it has been committed, and after the parties have been to the expense and annoyance of a trial in the inferior court. Such were the principles upon which courts formerly acted, and there is now no less reason for so acting than formerly.

The writ may be issued on the application of the party interested in the proceedings sought to be stayed, or on the application of a stranger to such proceedings. For it is apprehended that the keeping of all courts within their proper and legal jurisdiction is of such general interest and of such public importance, that the sovereign power should be exercised whenever and however informed of an intention in any tribunal to overreach the proper and legal limits of its jurisdiction.

But in order to authorize a court to issue this high prerogative writ, the inferior court, against which it is directed, must be actually proceeding to act in a matter where it has no jurisdiction; a mere apprehension that such court will undertake to act, is not sufficient. For the presumption that no court will proceed in any matter not within its jurisdiction, is so strong, that it cannot be rebutted, except by the fact that it has actually commenced to act.

The writ is issued against the judge of the inferior court, and the party who is prosecuting the proceedings in such court, which is sought to be stayed; and it commands them to no further proceed in such case; disobedience of the command is punished by the attachment of the judge and party, followed by fine and imprisonment at the discretion of the court, as for contempt.

The writ is allowed to any inferior court, whether temporal, military, or ecclesiastical, and to the court of admiralty. At one time there was great strife between the civil and ecclesiastical courts; the latter were eager to extend the limits of their jurisdiction, and the former to keep the ecclesiastical courts strictly within their acknowledged jurisdiction. Consequently the writ of prohibition was frequently resorted to; and therefore much of the learning upon this branch of the law, is found in the reports of cases where the writ was issued to ecclesiastical courts.

The writ is allowed whenever it is made to appear that an inferior court is exceeding the legal bounds, and proper limits of its jurisdiction, either by proceeding in a matter not within the jurisdiction of such court, or when the court has no jurisdiction over the person of the party complaining, or when a suit is commenced in an inferior court, upon a matter within its jurisdiction, but a matter arises in the defense of such action, which is not within the jurisdiction of such inferior court.

As illustrative of these propositions, we will here present a few cases where the courts have held the writ allowable.

In the case of The People *vs.* the Tompkins General Sessions, 19 Wend. Rep. 154, it was held that when a court is entertaining jurisdiction over a case in appeal, when no appeal was allowable by law, prohibition was a proper remedy.

In the case of Quimb Appo. *vs.* The People, 20 New York Reps. 531, it was held, that when a court had announced its intention to set aside a conviction and sentence, and to grant a new trial, in a case where the court had no legal authority to set aside a conviction and grant a new trial, prohibition would lie; it was insisted in that case, that the court had jurisdiction of the offence and over the person of the defendant, and that the setting aside of a conviction and sentence, and the granting a new trial, when the court had no legal authority to do so, was simply an error in the proceedings of the court; that errors cannot be re-examined in a writ of prohibition. The court, however, recognized the doctrine, that prohibition lies, when a court is transgressing the bounds prescribed by law, although it be, in handling matters, clearly within its cognizance.

In the case of D. Haber *vs.* The Queen of Portugal, 7 Eng. Law, and Equity, Reps. 340, it was held that no English court has jurisdiction to entertain an action against a foreign Sovereign for anything done, or omitted to be done, by him in his public

capacity as representative of the nation of which he is the head. And that if a party should commence an action in an English court, against a foreign Sovereign, to enforce the payment of a debt, claimed to have been contracted by that Soverign in his public capacity, prohibition would lie, to prevent such party and the court in which such action was commenced from proceeding further in the case.

Prohibition also lies after judgment, to restrain a court from proceeding to execute a judgment, rendered in excess of jurisdiction.

Therefore, when suit was commenced in a County Court, upon a promissory note, and the defense set up that the consideration for the note was a certain piece of land; that the title was not good, and the consideration of the note had, therefore, failed, and objected, in hearing, to the jurisdiction of the courts on the ground that the County Court had no jurisdiction to determine title to real estate. The judge overruled the objection and gave judgment, and issued execution. It was held that prohibition would lie to restrain the execution of the judgment.

And in a case where the plaintiff's complaint was for a trespass, and the defendant set up title to the premises, upon which it was claimed the trespass was committed, and the judge dismissed the case on the ground that the court had no jurisdiction when title to real estate was involved, and yet rendered judgment against the plaintiff for costs, prohibition was held to lie, to restrain execution, Lawford *vs.* Partridge, 38 E. L. and E., Reps. 493.

In such cases the writ issues to the court, and not to the ministerial officer, in whose hands the execution is placed. For prohibition never lies to a ministerial officer, to stay the execution of process in his hands.

And, again, prohibition does not lie to restrain a court from issuing an execution in a case where the inferior court has not exceeded its jurisdiction in rendering judgment, although it would be illegal and irregular for such court to issue the execution; prohibition being issued to restrain a court from exercising judicial powers only, and not to correct its irregular and erroneous proceedings in matters within its jurisdiction.

Where the inferior court has jurisdiction of the subject matter, and of the parties, but errs in its decision of law, prohibition does not lie. The remedy in such case is by writ of error,

or by appeal. Therefore, although it may appear evident that the inferior court has, on the trial of the case, rejected proper evidence, or has received improper evidence, yet this is not a ground for prohibition.

If, however, an inferior court should construe a statute in such a way as to confer upon such court jurisdiction, under a certain state of facts, and that construction should be held erroneous by the higher court, prohibition would lie to such inferior court, should it undertake to exercise jurisdiction under such state of facts.

The writ is issued on the application of some person who fyles with the court, written suggestions, or statements, as to the acts and proceedings in the inferior court, and what further proceedings are intended to be had in such court. If the want of jurisdiction in such inferior court appears in the pleadings and papers of the case, a certified copy of such pleadings and proceedings should accompany the suggestions. And if the want of jurisdiction arises by reason of some matter not appearing in the papers and proceedings, these matters should be set forth in the suggestions; and all allegations of fact should be supported by affidavit. When all the facts are within the knowledge of the party making application for the writ, a verification of the suggestions would obviate the necessity of a separate affidavit. But when some of the facts are known by one person, and other facts known by another person, separate affidavits will be required. If the inferior court has jurisdiction of the parties, but not of the subject matter of the action, the defendant should, before moving for a prohibition, appear in the inferior court, and plead the want of jurisdiction, and take the opinion of the court thereon. And in case the inferior court, notwithstanding the plea, determines to hold jurisdiction, prohibition will lie. Pleading want of jurisdiction before motion for prohibition, is the better practice, for two very good reasons. First, it is presumed that if such inferior court is informed, and its attention is called to its want of jurisdiction it will desist from acting in the matter, without any interference from another court. And secondly, that although jurisdiction cannot, generally, be exercised simply upon consent of parties, where jurisdiction does not exist in law, yet there are cases in which consent of parties would be regarded as a waiver of want of jurisdiction ; in such cases, if no objection is made to the jurisdiction, in the inferior court, a waiver will be presumed.

Appearance and plea to the jurisdiction, are not, however, absolutely necessary. For when an inferior court has no jurisdiction to entertain a suit, it is not necessary to entitle a party to a prohibition, that he should have there pleaded to the jurisdiction, and that the plea should have been overruled. And especially is this the case, when the court has no jurisdiction over the person of the defendant.

Upon fyling the suggestions and affidavits, if the prohibition is moved for on grounds not appearing in the record, it is not usual for the court to grant the writ in the first instance, but to enter a rule against the judge and party, to appear and show cause to the court why a prohibition should not be issued, accompanied with an order that no further proceedings be entertained until the court has passed upon the rule to show cause, a copy of which is served upon them. If on the hearing to show cause, it is clear that the prohibition ought to be granted, the rule is made absolute. But when the party has suggested either matter of fact, or of law, for obtaining the writ, and the question appears to the court doubtful, the party applying is directed to declare in prohibition; that is he is directed to prosecute an action by fyling a declaration against the other parties upon a supposition or fiction (which is not transversable) that they have proceeded in the suit below, notwithstanding the writ of prohibition. This action is based upon a fiction; or, in other words upon an allegation of facts which are not true. In order to determine the parties right to a prohibition, he is required to allege that the court has already issued the writ, and that the defendant has wilfully disobeyed it.

As legal fictions are not in these days looked upon with favour, this defect in the common law practice should be cured by legislative enactments.

H. H. Moses.

Warren, O., June 27th, 1871.

RE-REGISTRATION OF REAL RIGHTS.

Too great publicity cannot be given to the laws concerning re-registration of real rights. The Quebec *Official Gazette*, in which, by law, the proclamation fixing the date when the re-registration is to be effected, is published, does not reach every person interested, and the consequences may be disastrous to many.

The following explanations may not, therefore, be out of place, especially at the present time, when the delay is about to expire in many places, as, in fact, it already has expired in the Counties of Laprairie and Chambly, and in the St. Ann's Ward of Montreal. Even if they do not give a sufficient explanation of the law in all respects they may, at least, afford such information as will enable those who are interested to understand the importance of giving their immediate attention to the preservation of their rights.

The subject of real rights is, without doubt, the most important in our civil law, if we consider that it secures the rights of those who are incapable of protecting their own interests, and guards the most important transactions with solid guarantees.

Our Civil Code has greatly simplified the registration of real rights, more particularly with regard to those which are connected with the legal hypothec of married women and minors, and also in reference to the alienation of rights of ownership. Consequently lenders and purchasers are now more satisfactorily secured.

Before the Statute of 1841, (4 Vic., c. 30,) purchasers and lenders were forced to rely entirely on the documents produced, whilst, very often, essential documents containing important reserves, might have been concealed by the party selling or borrowing; such, for instance, as a right of usufruct, which was not included in the owner's title, and also any former purchaser's title. For example, a person bought a property, carefully verified the vendor's titles, found them correct, paid the price, and thought himself peaceable proprietor. Suddenly, a former purchaser, who had kept his title secret, and who was not in open possession, claimed the property, and his right was confirmed. By what means could the second purchaser have guarded against

the error wherein he fell? He could not have done it; for there was no publicity or registration of the first purchase. In fact, there was at that time no security against claims, incumbrances, and hypothecs; the purchaser was forced to rely on the good faith of the vendor as to whether he had not before sold the property to another, who was not in open possession, or granted a long lease thereof, and pocketed the rent in advance, or incumbered it in some other way. This state of things could not be tolerated much longer; it became evident that an immediate remedy must be applied. Consequently the Legislature, in order to protect purchasers of real estate, and creditors secured by hypothec, enacted a law to provide against the losses and evils that they so frequently experienced from secret and fraudulent conveyances of real estate, and incumbrances on the same, and from the uncertainty and insecurity of titles to lands in this Province to the manifest injury and occasional ruin of purchasers, creditors and others.

By the above mentioned Statute, 4 Vic., c. 30, coming into force, 31st December, 1841, a law to the above effect was passed, which partly obviated those losses and evils for the future, by providing that a memorial of all deeds, conveyances, notarial obligations, wills, judgments, appointments of tutors, and all privileged and hypothecary rights, claims and incumbrances, whereby any lands, real or immoveable estates in this Province, shall or may be alienated, conveyed, mortgaged or affected, may be registered, and if not registered, shall be adjudged to be inoperative, void, and of no effect against any subsequent *bonâ fide* purchaser, mortgagee, or hypothecary creditor or incumbrancer.

The inconvenience and difficulty of ascertaining the rights of the wife against the property of her husband, and the rights of the minor against that of his tutor, were not, however, overcome by the 4 Vic., c. 30, inasmuch as the wife and minor had a *general* legal hypothec on the whole property of the husband and tutor respectively; a registered judgment also affected the whole of the property of the debtor belonging to him at the date of such judgment. But the purchaser or creditor had nevertheless the satisfaction of being informed of the existence of these rights by the Registration of the marriage contract, tutorship, judgment, etc., and was therefore induced to make the proper inquiries.

Experience soon showed that the general hypothec was an inconvenient and inexpedient restraint and burden on the aliena-

tion of real estate and an obstacle to the introduction of foreign capital, by causing delays and heavy expenses in making the necessary searches, and examining the necessary documents; and, above all, the liability of being deceived by approximate calculations which had to be made as to the amount of general hypothecs. This was the reason for enacting the Statute 23 Vic., c. 59, which came into force in 1860, being an Act for the protection of purchasers of real property, and to facilitate the introduction of capital into Lower Canada; in pursuance of which the general legal and tacit hypothec created by, or arising out of, a judgment rendered *tutelle, curatelle,* or any matrimonial rights, instrument, or document executed, or any appointment (of Tutor or Curator) made, or any act or thing done, happening, or registered after that Act came into force, does not bind or affect any real property, unless and until a notice has been filed with the Registrar specifying and sufficiently describing such property, and stating it to be then in the possession of the party against whom such hypothec is registered as his property. Therefore, no property can be affected to the prejudice of third parties; viz., any persons acquiring the same, or registering any hypothec thereon for any right they may have. For instance, A. owns a property; he is married to B., who holds a claim for a matrimonial right, but not registered with a special hypothec on that property. A. sells it to C., who makes the necessary search, and finds nothing registered specially affecting that property. C., the purchaser, therefore, remains undisturbed and unmolested in his possession, B. having forfeited her right by not making the necessary registration. The same example will sufficiently illustrate the case of a tutor selling his property, against which no special hypothec in favour of the minor has been registered.

By Sec. 29 of the same statute it is enacted that the Commissioner of Crown Lands shall cause to be prepared a correct plan of each city, village, parish, &c., in each registration division in Lower Canada.

All those Statutes are fused into the Civil Code, which is in force since the 1st of August, 1866, and in which are included several changes and additions, to be found below among the detailed rights subject to registration; particularly the *obligation* to register the right of ownership before selling, hypothecating, or otherwise encumbering any real estate. The registration of, transmission of real estate by succession, and the registration of the legal customary dower (by Articles 2098 and 2116).

By Article 2168 of the Civil Code, it is provided that as soon as the plans and books of reference for a registration division, (or for any ward in a city, Stat. of Quebec 1870) have been deposited with the Registrar, and notice has been given by proclamation of such deposit, the number given to a lot upon the plan and in the book of reference is the true description of such lot, and no other description will be deemed sufficient, and the registration of any deed not containing the necessary description by number does not affect the lot in question.

By Article 2172, within eighteen months after the proclamation, the registration of any real rights upon any lot of land within the division or ward so proclaimed must be renewed by means of the registry at length, of a notice describing the property affected by the first registration by the number it bears on the official plans. By Article 2173, if such renewal be not affected, the real rights preserved by the first registration have no effect against other creditors and subsequent purchasers whose claims have been regularly registered.

The words "real rights" used in the Code (instead of hypotecs, as in the Statutes) is a general term understood to comprehend all rights, without exception, which can attach to immoveable property; therefore in pursuance of this Article (2173) any person acquiring since the date of the promulgation of the Code, 1st August, 1866, against an immoveable property or real estate a right of possession, usufruct, redemption, conventional or legal hypothec, or any other real right, is bound to re-register the same in the manner above referred to within the delay of eighteen months from the day fixed by the proclamation; otherwise he may lose his priority of claim, or even lose his real right altogether, against a subsequent purchaser or creditor who may have registered. Take the example of a creditor holding a mortgage. A owns a property worth $1,400, he gives a mortgage to B for $700 thereon, which is registered before the proclamation, and afterwards a second mortgage for a like amount to C, which is also registered before the proclamation. B neglects to re-register his mortgage during the eighteen months, while C conforms to the requirements of the law. C, the second mortgagee or creditor, has a right to claim preference, and should he bring the property to sheriff's sale, and the property be sold at less than its value, say $1,000, he will receive his $700, in full, and B will receive the balance after deduction of the costs. In confirmation of this, we refer to the

judgment rendered lately in the Court of Appeals (Queen's Bench) in a case of Bourrassa, appellant, and McDonald, respondent (the property is situated in Lapraire where the term limited by proclamation had already expired). In this case Bourrassa who held a hypothec on a certain property renewed its registration before the eighteen months delay expired, and McDonald who held a *bailleur de fonds* claim, did not, for the reason that during the eighteen months the property was in the hands of the Sheriff. His Honour Chief Justice Duval with the majority of the Court ruled that Bourrassa having registered within the time prescribed by law was entitled to rank by preference over McDonald. The fact that the property was under seizure could not deprive Bourrassa of the rights which the law gave him; the judgment of the Court therefore sustained his claim of priority, on the sole ground that he had re-registered while McDonald had not.

Many seem, nevertheless, to be in doubt whether the owner of a property, who was in actual possession before the Code, must register the deed or title conveying to him the ownership, and also whether such purchaser, who has registered his title, must renew such registration made before the Code came into force. It would seem to be necessary for every purchaser, since 1866, (August 1st) if we adhere strictly to the terms of Article 2098, which provides that all acts conveying ownership must be registered, or in default of such registration, the title of conveyance cannot be invoked against a third party who has purchased the same property from the same vendor for a valuable consideration, and whose title is registered, and that so long as the right of the purchaser has not been registered, all conveyances, transfers, hypothecs or real rights granted by him in respect of such immoveable, are without effect; and Article 2173, which provides that if the renewal be not effected, the real rights preserved by the first Registration have no effect against other creditors, and subsequent purchasers whose claims have been regularly registered. Let us suppose the case of a person who sells one and the same property to two separate purchasers at separate times, (or that the vendor's heir sold it to the second purchaser,) will not the latter purchaser, if he has regularly registered his title, and renewed its re-registration during the eighteen months' delay, be in a position to give a good title to any future purchaser?

I am inclined to think that he would, and, in fact, he should

be able to do so, after failing to discover any trace of contrary title upon a search against the particular number of the property on the official plans and books of reference during the period of eighteen months, and after finding the vendor's title duly re-registered; or, in other words, if the purchaser is secure against all mortgages, which are not re-registered, why should he not be secure against a presumed proprietor who has not conformed to the law, which was certainly intended to protect the purchaser, not only against mortgages, but also against claims of ownership as well as real rights of any other nature. With regard to purchasers before the Code, several gentlemen of high standing in the legal profession, with whom I have had occasion to discuss this point, are of opinion that purchasers, before the 1st of August, 1866, who took immediate and open possession of the real estate bought by them, not being then obliged to register their title, are not obliged either to register or re-register now; that purchasers before the above date who did not take open and immediate possession, such as purchasers of wild lands, who were bound to register in order to secure their title, are now bound to renew such registration; and that all purchasers since 1st August, 1866, are bound to register and renew.

Many have already attended to the re-registration of their real rights, but there are, in all probability, a greater number who have hitherto neglected it, for the simple reason that they have not been sufficiently informed.

The notice (by proclamation in the *Official Gazette*) has been given for the following Counties and Wards, and the time for re-registration will be within the following dates:—

County of Laprairie						time expired
County of Chambly						time expired
St. Ann's Ward, Montreal,	from	3rd	January,	1870,	to 3rd July,	1871
St. Antoine Ward,	"	"	1st Sept.,	1870,	to 1st March,	1872
St. Lawrence Ward,	"	"	"		"	"
West Ward,	"	"	"		"	"
Centre Ward,	"	"	"		"	"
East Ward,	"	"	31st Jan.,	1871,	to 31st July,	1872
Jacques Cartier Ward, Quebec,			"		"	

N. B.—The proclamation for the remaining wards of the City of Montreal is expected to issue within a short time; the plans having, in most cases, been already forwarded to the Crown Lands Department.

The following deeds, acts and real rights, are those of most usual and common occurrence, which are subject to registration, and in most instances to re-registration, if they have been registered before the period fixed by the proclamation. (Of course mortgages which are to be paid before the expiration of the eighteen months, need not be re-registered; to do so would be a useless expense.) Their enumeration may lead the reader to see at a glance what rights and titles he may need to re-register:—

All deeds giving a security on real estate, or encumbering real estate in any way.

All deeds conveying ownership in immoveable property, by sale, exchange, gift, &c., (within thirty days after their execution.)

The transmission of property by succession, and every conveyance by will (six months), (and three years for absentees.)

Judgments cancelling a registered title.

The privilege of a builder, thirty days after the acceptance of the work.

The privilege of copartitioners (thirty days after the deed of partition.)

Creditors claiming separation of property, preserve upon the estate of their deceased debtor against the creditors of the heirs, by registering the rights which they have against the succession, within six months after the death of the debtor.

Fiduciary substitutions, in respect of immoveables in deeds of gift, (thirty days.)

The legal hypothec of the wife on the immoveables of her husband, including the legal customary dower, according to Article 2116 of the Code.

Tutors to minors and curators to interdicted persons are bound to register without delay the hypothecs to which their real property is subject, under pain of punishment for misdemeanor, and of being liable for all damages. Married men who do not without delay register the hypothecs or incumbrances against their estate in favour of their wife, incur the same penalty. (The hypothec of minors and interdicted persons against their tutors and curators affect only such real property as is specified in the act of tutorship or in a notice to the registrar.)

Judgments and judicial acts of Civil Courts, when registered create hypothec from the date only of the registration of a notice

specifying and describing the real property of the debtor upon which the creditor intends to exercise his hypothec.

Claims for accrued interest for over 5 years in cases of sale and of life rents, and over 2 years in other cases.

Every transfer of a mortgage or hypothecary claim immediately and specially before the signification of the transfer: (this provides against persons running the risk of being deceived by anterior transfers of which they were ignorant.)

The lease of an immoveable for a period exceeding one year cannot be invoked against a subsequent purchaser unless registered.

With the obligation of re-registration of all real rights and the obligation of specifying the property on which the mortgage, hypothec or real right is to take effect, we are protected against claims which could not be fully ascertained under the old system ;—And the facility of searching against any property which will be hereafter designated by a particular number, under which number all entries are to be made in the registrar's books, will prove to be very advantageous to those transacting in real estate by enabling them to ascertain more promptly and satisfactorily the incumbrances upon any property.

A registration law, however, can scarcely be enacted to provide satisfactorily for such cases as the following: viz., The case of a vendor selling the same property to two different purchasers. (In this case the first registered deed takes preference.)

The case of a creditor who lends to a tutor when the property is affected by the legal hypothec of the minor. He has no means of ascertaining the amount for which the tutor may be indebted for the balance of the tutorship account, *reliquat de compte* if the account has not yet been rendered, the tutor's administration not being a public matter. (In this case security should be obtained from a vendor whose property is thus affected.)

The present system of re-registration of real rights is remarkable for its simplicity. It is however a matter of regret that the Legislature has not deemed it advisable to compel the registration of real rights such as Customary Dower and other matrimonial right, which were created prior to 1860 and may affect immoveables at the present time.

Registrars are bound to keep an Index for the number of each lot, and under such number is made every entry respecting such lot. A person wishing to ascertain what real rights affect the

property corresponding to the number by which it is designated, can, upon opening the book, at once discover what encumbrances and rights are registered against it, thus relieving him from the necessity of waiting weeks, and sometimes months, for a certificate of search.

The law provides for errors and omissions in the plans and books of reference, and if any are found in the description or dimensions of a lot or parcel of land or in the name of the owner, it must be reported to the Commissioner of Crown Lands, who may, when the case requires it, correct the original and the copy, and certify such correction.

Such corrections are, however, to be made without changing the number of the lots, and in case of omission of a lot, it must on insertion be distinguished by a letter so as not to interfere with the original numbering.

No right of ownership, however, can be affected by any such errors, nor can any error of description, dimensions or name be interpreted so to give any person a better right to his land than his title gives him.

Mr. Sicotte, Secretary to the *cadastration*, has prepared a special book of reference, containing the measurement of every property in this city, with the name of owner and number of lot in conformity with the plan and book of reference; it will be found indispensable to the creditor or purchaser as a key for immediate reference to the registers.

P. E. NORMANDEAU,
Notary Public.

MONTREAL, 8th July, 1871.

LA JURISPRUDENCE COMPARÉE DE LA COUR D'APPEL.

Le résumé de décisions publié par la *Revue*, dans son dernier numéro, sous le titre de *Jurisprudence comparée de la Cour d'Appel*, a fait plus de bruit, qu'il n'était, dans la pensée de ses auteurs, destiné à en produire. Les Honorables Juges, dont les décisions ont été ainsi mises en regard les unes des autres, en ont témoigné publiquement leur mécontentement, à plusieurs reprises, pendant le dernier terme de la Cour d'Appel, et ont réclamé contre de nombreuses erreurs que contiendrait cet article, suivant eux, sans cependant en signaler aucune en particulier. D'un autre côté la publication de ce travail a fourni à la presse quotidienne, un prétexte plus ou moins plausible pour faire sur l'administration de la justice en général et sur le compte des juges de la Cour d'Appel en particulier, des commentaires dont les rédacteurs de cette *Revue* ne doivent pas accepter la responsabilité. C'est donc pour nous un devoir, dans de telles circonstances, de fixer le sens et la portée de l'article qui a fait le sujet de tant de commentaires, afin que par des interprétations plus ou moins exagérées, on ne nous fasse pas dépasser la limite que nous avons cependant cru devoir atteindre.

Disons d'abord qu'il n'est jamais venu à la pensée des rédacteurs de cette *Revue*, en publiant ce travail, de manquer en quoi que ce soit au respect et à la considération dus à la magistrature de ce pays. C'est donc avec un profond regret que nous avons entendu un des Honorable Juges de la Cour d'Appel, mettre en suspicion les motifs des auteurs de l'article en question ; car convaincus, comme nous l'étions, que le public éclairé et tout spécial auquel s'adresse cette *Revue*, ne se méprendrait pas sur la portée de notre article, nous avons été fort surpris de voir que grâce à une susceptibilité louable peut-être, mais exagérée, l'on pût ainsi attribuer exclusivement au personnel de la Cour ce qui était aussi destiné à faire ressortir les vices du système judiciaire lui-même.

Il nous serait certainement difficile d'indiquer ici, et dans un seul article, les changements indispensables, les réformes urgentes, que requiert l'administration de la justice en Canada. Ce sera là le sujet de plus longues et plus nombreuses études. Néanmoins,

la publication de notre article a déjà eu pour résultat de faire ouvrir les yeux à bien des gens, de les forcer de réfléchir et d'observer que si parmi les arrêts d'un tribunal, le premier du pays, on peut relever de telles contradictions, il doit y avoir défectuosité dans le système même qui expose la justice à de semblables inconséquences.

L'Honorable Juge qui a paru le plus blessé de la publication de l'article en question, a lui-même indiqué deux des vices de ce système (que notre article avait en vue de faire ressortir), en déclarant que ces prétendues contradictions n'existaient réellement pas, et que si les faits de chaque cause mise en regard par la *Revue*, avaient été étudiés, il aurait été facile de voir que chaque cas étant dominé par des circonstances différentes, la conclusion devait nécessairement y être différente aussi.

Sans vouloir accepter complètement l'espèce de rectification que voulait par là nous imposer l'honorable juge, car nous devons à la vérité de maintenir qu'il y a réellement dans les décisions publiées des contradictions que rien ne justifie, nous pouvons dire cependant qu'il est fort possible, que si les jugements, non seulement de la Cour d'Appel mais de toutes nos Cours, étaient motivés comme ils devraient l'être, et si nous avions des rapports officiels des arrêts de nos tribunaux, non seulement beaucoup des contradictions que nous avons signalées s'expliqueraient, mais nous dirons même que dans les cas où elles ne pourraient pas s'expliquer, le tribunal mis sur ses gardes, par la double garantie que nous demandons, aurait certainement évité les autres.

L'Article 472 du Code de Procédure dit :

" Le jugement doit contenir les causes de la demande et doit être susceptible d'exécution."

" S'il y a eu contestation, le jugement doit en outre contenir *un sommaire des points de droit et de fait soulevés et jugés, ainsi que des motifs de la décision*, avec mention du juge qui l'a rendu."

C'est certainement là un des articles les plus importants de notre Code de Procédure ; car c'est celui qui devrait donner au plaideur la certitude que son procès ne sera jugé qu'après une étude complète et mûrie des faits et du droit. Et cependant comment cet article est-il mis en force dans la plupart des cas ? Combien y a-t-il de jugements de nos tribunaux qui contiennent *un exposé des points de faits ?* Nous serions tentés de répondre qu'il n'y en a pas un seul, si nous ne consultions que notre propre

expérience. Combien y a t-il maintenant d'arrêts de nos Cours qui ne contiennent aucun exposé quelconque *des points de droit soulevés?* Le nombre en est infini. Tous les jours, des jugements sont portés en appel, sur ce motivé simple et commode:

" Considérant que le demandeur n'a pas prouvé les allégations " matérielles de sa déclaration, La Cour déboute, etc."

Et la Cour d'Appel, confirme dans les termes suivants: " Considérant qu'il n'y a pas d'erreur dans le jugement dont est appel, confirme, etc."

Le plaideur ruiné par un semblable jugement a-t-il au moins la conviction morale que les juges ont parfaitement saisi et compris tous les points de sa cause, qu'ils les ont appréciés et jugés? Nullement, et souvent même il peut en outre se plaindre d'avoir été jugé sur une question qu'il n'avait pas prévue, que son adversaire n'avait pas soulevée et sur laquelle il n'a jamais eu l'occasion d'être entendu.

Qui ne voit cependant combien cette disposition de la loi, que nous venons de citer, est sage et nécessaire? Le juge qui prend la peine d'écrire un résumé des faits d'une cause, d'en exposer ensuite les questions de droit, et de donner enfin les motifs de sa décision, se trompe rarement; et s'il se trompe, son jugement a encore l'avantage de pouvoir être présenté au tribunal supérieur dans la forme la plus avantageuse, la plus claire et la plus satisfaisante et pour celui qui l'a rendu et pour celui qui l'a obtenu. C'est une garantie de plus pour le plaideur heureux et c'est toujours une satisfaction pour celui qui a succombé dans la lutte, car si les motifs de l'arrêt qui le condamne sont bons, il sera souvent convaincu de son tort, sans encourir le risque d'une nouvelle tentative devant un tribunal supérieur.

Comment cette pratique *illégale*, pour ne pas dire plus, de ne résumer les faits et de n'exposer les points de droit que très rarement dans les jugements de nos Cours, et quelques fois même de ne faire ni l'un ni l'autre, a-t-elle pu s'introduire dans nos tribunaux, c'est ce que nous n'avons jamais pu comprendre. Car il suffit d'ouvrir n'importe quel volume du Journal du Palais, de Dalloz, de Sirey, etc., pour voir avec quel soin la règle qui nous régit sous ce rapport et qui existe pareillement en France, est scrupuleusement suivie dans ce dernier pays. Il n'y a pas un arrêt rapporté dans ces grandes collections, qui ne contienne avec une précision, une exactitude et une concision admirables, l'exposé des faits et du droit de chaque cause, et les motifs au long de la décision du juge.

Il est sans doute beaucoup plus facile de se dispenser de ce travail, et l'on dira peut-être que souvent le résultat n'en est pas plus mauvais. Nous sommes convaincus du contraire, et nous croyons qu'à part la grave responsabilité qu'assument ceux qui rendent de semblables jugements au mépris de la loi et de leur devoir, il y a là une question des plus sérieuse et des plus importante pour la bonne administration de la justice. La seconde réforme que nous avons indiquée ci-dessus, serait la publication de rapports officiels des causes décidées par chaque Cour, sous le contrôle même du juge ou des juges qui auraient rendu le jugement. Ce serait le complément de la première réforme, et rien ne serait plus propre à assurer la fixité de notre jurisprudence. Il y a aujourd'hui de ces rapports dans beaucoup de pays, et ils ont tous une valeur et une importance chaque jour plus considérable. La province d'Ontario elle-même a sur nous cet avantage, et il serait bon de suivre en cela l'exemple qu'elle nous donne.

LA RÉDACTION.

N. B.—L'abondance des matières nous force de remettre à la prochaine livraison, le sommaire des décisions récentes, ainsi que plusieurs articles qui nous ont été adressés.